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IN THE

Supreme Court of the United States

OCTOBER TERM, 1971

No. 71-99

HOWARD S. SPERING, *Petitioner*

v.

TEXAS BUTADIENE & CHEMICAL CORPORATION,
Respondent

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT

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July 19, 1971.

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PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT

The petitioner, Howard S. Spering, respectfully prays that a writ of certiorari issue to review the judgment and opinion of the United States Court of Appeals for the Third Circuit entered in this proceeding on October 21, 1970, with respect to which a rehearing was denied by order of that Court dated April 19, 1971.

OPINION BELOW

The opinion of the Court of Appeals as modified by order of that Court dated November 13, 1970, reported in 434 F.2d 677, appears in the Appendix hereto. A

copy of the order entered April 19, 1971 denying rehearing also appears in the Appendix hereto. No opinion was rendered by the District Court for the District of Delaware.

JURISDICTION

The judgment of the Court of Appeals for the Third Circuit was entered on October 21, 1970 and modified by that Court's order dated November 13, 1970. A timely petition for rehearing in banc was denied on April 19, 1971, and this petition for certiorari is filed within ninety (90) days of that date. This Court's jurisdiction is invoked under 28 U.S.C. 1254(1).

QUESTIONS PRESENTED

1. Whether conflicting courts of appeals decisions with respect to dismissals of plaintiffs' substantial claims with prejudice and without a trial on the merits, for failure of their attorneys to prosecute within local calendar rules, without knowledge of, or prior notice directly to, their clients of the attorneys' critical defaults and a fair opportunity to correct them, require resolution and a review of a nine-year-old 4-to-3 decision of the Supreme Court persistently protested by some justices, and repeatedly rejected by some courts of appeals as harsh, vicarious punishment, unnecessary, and an unjust denial of a party's right to a fair day in Court?

2. Whether the undisputed fact of an attorney's repeatedly giving incorrect and misleading information to his client on the status of the case, stating, among ther things, that defendant was responsible for long delays, acknowledged by the attorney on the record, presents a case of breach of his agency releasing the client from the consequence of his attorney's undisclosed critical neglects under local calendar rules, and

a matter of first impression not heretofore resolved by the Supreme Court in cases denying plaintiffs a trial on the merits solely for failure of their attorneys to prosecute.

3. Whether, in such a case, dismissal with prejudice of a valid and substantial claim based on long privity of vital professional services by a plaintiff in the formation and operation of the defendant, is repugnant to the sense of justice and to a litigant's right to due process, when entered without his knowledge of his attorney's critical defaults under local calendar rules and without an opportunity afforded him after notice thereof to correct them by pursuing his case through discovery and a trial on the merits.

4. Whether an attorney's neglect and concealed failure to prosecute within local calendar rules not known to his non-resident client, should result in dismissal with prejudice of his client's substantial claim without a trial on the merits, when an attorney has no general or implied authority in law to agree to, or otherwise to effectuate formally, any such dismissal with prejudice without express approval and authority to do so from his client, which had never been obtained.

LOCAL RULES OF COURT INVOLVED

Local Rule 12 of the United States District Court for the District of Delaware:

> "Subject to the provisions of Rule 23(c), F.R. C.P., in each cause pending, wherein no action has been taken for a period of one year, the Court may, on its own motion or upon application of any party and after reasonable notice, enter an order dismissing such cause unless good reason for the inaction is given. An application for continuance shall not be deemed to be action precluding such

dismissal. After any such application for dismissal has been filed, no application for a continuance or any proceeding taken under discovery rules, F.R.C.P., shall be deemed to toll the application of this Rule."

Local Rule 3. Calls of Calendar, of the United States District Court for the District of Delaware, appears in full in footnote 2 of the Opinion of the Court of Appeals in this case, which is printed in the Appendix.

STATEMENT OF THE CASE

A dispute arose between petitioner, Spering, a Yale Law School graduate of 1932 in private law practice in Washington, D. C. and the respondent, Texas Butadiene & Chemical Corporation, TB&C, a Delaware corporation, in December 1964 over the amount of full compensation to which Spering was entitled for professional services rendered to TB&C. Spering had rendered vital professional services for TB&C in two separate periods: the first, of more than 8 years from March 1954, prior to the organization of TB&C, through July 1962, when TB&C's plant facilities were sold to Sinclair Petrochemicals, Inc., a subsidiary of Sinclair Oil Corporation; and the second, from June 1963 through October 1964, involving the Government's renegotiation of TB&C's government contract business.

1. First Period of Service

Spering's services for TB&C commenced in March 1954, prior to the incorporation of TB&C in July 1954, in the interest of creating it and its then proposed business project for the construction and operation of plant facilities for the manufacture of aviation gasoline for sale to the government and butadiene for sale to the synthetic rubber manufacturing industry. Spering had

unique knowledge and background experience with Government and the petroleum industry in both of these product industries over the preceding 12 years. TB&C was enabled to borrow the necessary first mortgage funds to initiate construction of such facilities by assignment to banks of a $15,000,000 Facilities Investment Underwriting contract negotiated for it by Spering and finally executed by the Department of Defense on July 13, 1955. The common stock of TB&C for that initial plant financing was owned 89% by Godfrey L. Cabot, Inc. (now Cabot Corporation) and Carl M. Loeb, Rhoades & Co., who continue to be the controlling stockholders.

The plant was completed in February 1957. Among many other services for TB&C, Spering was primarily responsible for successfully negotiating ten (10) successive supply contracts for TB&C with the Department of Defense, which aggregated about $112,000,000 of sales (approximately 60% of TB&C's total business) in the period from February 1957 through July 1962. In that first period of eight and one-third years, Spering devoted 851 days of recorded service time, an average of approximately 100 days per year, to TB&C's affairs. TB&C had achieved a net profit after taxes of $25,805,078 before payment in August 1962 of its initial distribution to stockholders following the sale of the plant to Sinclair. More than $18,000,000 of this was net gain from sale of assets, the rest was net income earned chiefly in the later years of operations.

The dispute concerning full compensation for services in this first period arose from Spering's clear understandings at the outset, and later repeated, with the initiator of the project and first president of TB&C. The basic arrangement was that, if Spering

would serve the TB&C project at support-level per diem rates during the preliminary development, promotion and construction years and the non-profit or low-profit operating years, he would be ultimately compensated on the basis of the real value of his services to the project to be determined in the light of the success of the undertaking when the measure of its success and his contributions to it could be determined and such compensation could be readily paid. Spering claims herein that the fair value of his services to TB&C in this first period may be fairly measured as at least 3% of the $25,000,000 net profit after taxes, or $750,000. This is less than 1% of the $112,000,000 of sales to Government he was primarily responsible for negotiating for TB&C. Having received $148,498 in per diem fees from TB&C during that long first period, he would credit this against the gross amount, and claims herein that the balance of about $601,000 remains payable to him with respect to this first period. See Spering's deposition, Docket #32, pages 178-9.

Throughout this entire period of service, the payments Spering received from TB&C were essentially minimum per diem compensation, sufficient only to provide support for him, his office, and office personnel to be able on a current basis to continue the work for TB&C. Indeed, the information contained in Spering's depositions, Docket # 32, and his answers to interrogatories, Docket # 25, with exhibits identified, in the record in this case disclose comprehensive data from his records that show that such compensation from TB&C was *substantially below* "fair value" compensation he received from some other clients, and was even below the average net compensation he received from *all* other clients.

2. Second Period of Service

Subsequently, in May 1963, the Government initiated renegotiation proceedings against TB&C under its Government contract business that was concluded in July 1962. Spering was then requested to represent TB&C in those proceedings, and did so actively from June 1963 through successful conclusion in October 1964, first before the Eastern Regional Renegotiation Board and later before the national Renegotiation Board. The national Board regarded the whole operation and sale of the plant as constituting a "windfall" to the proprietors of TB&C. Its figures reflected claims of excessive profits aggregating more than $700,000. To this would have been added a penalty of at least $350,000, since penalties are assessed at 100% of the amounts of costs deemed to have been mispresented in the original contracts negotiated on the basis of represented costs. Thus a total of more than $1,050,000 was at stake in these negotiation proceedings. See Spering's deposition, Docket # 32, pages 169-171. Spering's 63.5 days of recorded service time in this second period resulted in the final Notice of Clearance issued by the national Board on October 15, 1964, with *no payment* of any amount by TB&C to the Government.

The dispute concerning full compensation for services in this second period arose from Spering's claim for compensation on the basis of *quantum meruit.* Such real value of his services, to which attorneys are entitled within the sense of Canon 12 of the Canons of the American Bar Association, could only be determined and asserted when the work was completed and the success achieved could be known and evaluated. Spering claims that the fair value of his services to TB&C in this second period may be fairly measured as

approximately 30% of the $1,050,000 amount that was at stake in these renegotiation proceedings, or $315,000. Having received $15,655 in sustaining fees from TB&C during this second period, he would credit this against the gross amount, and claims herein that the balance of about $300,000 remains payable to him with respect to the second period of service. See Spering's deposition Docket # 32, pages 174-7.

3. History of the Case

This action was commenced in the United States District Court for the District of Delaware on June 25, 1965. Jurisdiction in that federal court was based on diversity of citizenship, Spering, the plaintiff, being a resident of Chevy Chase in the State of Maryland, and TB&C being incorporated under the laws of the State of Delaware. The matter in controversy, exclusive of interest and costs, substantially exceeds the $10,000.00 amount required for jurisdiction.

The suit was initiated within nine (9) months after Spering had last rendered services to TB&C in October 1964, and approximately seven (7) months after TB&C rejected his final statement and requested a billing on a time basis of compensation. Spering was represented by Morris, James, Hitchens & Williams, one of the larger law firms in Wilmington, Delaware, under a contingent fee agreement. The firm assigned two of its senior trial lawyers to handle the case, though only one of those two communicated with Spering throughout the proceedings in the District Court and through oral argument before the Court of Appeals. That firm and the individual lawyer were dismissed by Spering shortly after the October 21, 1970 ruling by the Court of Appeals. Said firm and that one member of the

firm will be referred to herein as Spering's attorneys or attorney, or his former attorneys or attorney.

TB&C's attorneys commenced taking Spering's deposition for a full day in Wilmington, Delaware on August 12, 1965. Spering's entire files covering his work for TB&C over the eleven (11) year period were then promptly delivered to his former attorneys' office in Wilmington on demand of TB&C's attorneys, who examined them at length between September and December 1965. TB&C's answer was then filed December 6, 1965 after many requests by its attorneys for extensions of time, and on December 14, 1965 extensive interrogatories to Spering were filed by TB&C. On December 30, 1965, TB&C resumed taking another full day of Spering's deposition in Wilmington, Delaware and, on adjourning, indicated it would continue at a later date. TB&C then amended its answer on January 17, 1966.

Spering's attorneys opposed those interrogatories as unduly burdensome and largely irrelevant because they would require him to examine comprehensively every file for every one of his clients over the eleven-year period from 1954 through 1964, and his time records, to determine precise amounts of fees received, all fee arrangements in each matter for each client, the extent of time devoted to each and to compile and report all such information together with tables of totals. Nevertheless, after consideration of briefs and oral argument, the District Court entered an order on July 29, 1966 overruling those objections. Spering was thus compelled to devote more than 20 full days of work in ferreting out all those files and information, reporting and compiling the same, and preparing the answers to those

interrogatories. His answers filed on October 21, 1966 consisted of 14 pages legal size, plus table exhibits.

A. Former Attorney's Neglect and Misleading Statements

Spering's affidavits dated September 20, 1969 and October 14, 1969 filed in the District Court on October 15, 1969, and his statements at the hearing on October 16, 1969, show his time devoted to those answers and his continued attention to his case at all times. Docket # 45 and # 49. They also show the following undenied fact and events:

(1) Spering's attorneys wrote him a letter dated January 16, 1967 falsely stating that the Interrogatories to TB&C enclosed therewith had been "filed". Docket entries in that District Court, examined by Spering after learning of dismissal of his case, show that those interrogatories were not in fact filed until 13 months later on February 1, 1968, Docket # 26. TB&C's answers to those Interrogatories were filed on May 21, 1968, but Spering never was provided a copy of them until after his case was dismissed on September 16, 1969.

(2) From March 28, 1967 until December 20, 1968 Spering's attorney repeatedly advised Spering falsely that he had called for TB&C's files to be made available for examination, and that TB&C was responsible for delaying Spering's discovery efforts to examine those records, by stating that TB&C had not yet consolidated all such files and records from Houston and New York at one location and had not yet determined which papers did not relate to Spering that they might refuse to allow to be examined. Affidavits of two attorneys for TB&C, filed after dismissal of the case, flatly denied

that any such call, request, or demand had ever been made by Spering's attorney. His attorney also admitted to the District Court at the reargument on October 16, 1969 that he had never made "any effort" to get TB&C's records for examination. Docket # 45, page 9.

(3) Promptly after Spering's attorney informed him on December 20, 1968 that TB&C's attorneys had advised that their records were now consolidated and could now be examined, Spering and his attorney made plans to meet in Wilmington on Monday, January 13, 1969 and then go to New York to examine TB&C's records. But Spering's attorney wrote Spering on January 8, 1969 that he could not meet on January 13 and would fix a new date with Spering. Again in response to Spering's letter of March 26, 1969 to his attorney demanding that TB&C's records be examined promptly, his attorney wrote on April 1, 1969 that he is "giving the matter of production of records further attention at this time on a priority basis." His later admission to the Court that he had never made any effort in this direction constituted an acknowledgement that all of these communications to Spering were false.

(4) On August 4, 1969 Spering and his attorney agreed to go to New York for examination of TB&C's records in the week of August 18, 1969. But again Spering's attorney wrote him on August 13, 1969 advising that he had not finalized the plans to inspect TB&C's documents during the week of August 18th as discussed, but was attempting to combine the inspection with taking of depositions of TB&C's executives, and will have further advice for Spering concerning this matter shortly. That letter completely concealed the fact, clear from the Docket entries in the

District Court, that a motion for dismissal of Spering's case had been filed on August 6, 1969 and that his attorney had signed an acknowledgement of receipt of service of a copy of it on August 6, 1969, seven days before his letter to Spering.

(5) Spering had no knowledge or notice whatsoever of the fact that his case had been on the call of the Calendar under Local Rule 3 in September 1968 and again in September 1969, or that TB&C's motion to dismiss for failure to prosecute had been filed, until he received his attorney's letter on September 17, 1969 advising that his case had been dismissed by the District Court.

B. District Court Found No Guidelines, and Acted to Obtain Guidance from the Third Circuit Court of Appeals that Pressed for Disposal of Cases

On September 22, 1969, Spering's attorney filed Motion for Reargument, with an abbreviated affidavit by Spering attached stating his understanding that TB&C had been delaying Spering's examination of TB&C's records for about 21 months through December 1968. On October 6, 1969, TB&C's attorneys filed two affidavits denying that any call had been made to examine TB&C's records. On October 15, 1969, Spering personally filed additional affidavits containing the information recited in the above enumerated paragraphs. At the hearing on the Motion for Reargument on October 16, 1969, the substance of these affidavits was reviewed orally by Spering before the Court, and Spering's attorney made no denial of any of these statements when the Court afforded him an opportunity to do so or to explain. His only response was that he had no explanation, and he had already admitted to the

Court that he had never made "any effort" to get the TB&C documents.

At this reargument on October 16, 1969 the Chief Judge of the District Court stated that he was "assuming for the purpose of this argument that you (Spering) have a legitimate claim (against TB&C)" Docket # 49, pages 31 32. After TB&C's attorney argued that the case of *Link* v. *Wabash R.R. Co.*, 370 U.S. 626 (1962) at 663-4, ruled that controversies between a lawyer and his client do not affect the question of dismissal, the District Court Judge referred to the case of *Glo Co.* v. *Murchison Co.*, et al., 397 F.2d 928 (CCA-3-1968) cert. den. 393 U.S. 939, in which the Court of Appeals had reversed his own dismissal of that case for failure to prosecute, on motion of the same attorneys as represent TB&C in the instant case. The following from the transcript of the hearing on reargument in this case shows the confusion that confronts District Court Judges in such cases, and that the Chief Judge's refusal to vacate the dismissal of Spering's case was motivated by a need to have the appellate courts provide some specific guidelines in such cases, Docket # 49, pages 34-5:

> "THE COURT: . . . . That case, of course, did not give us too many guidelines as to what the District Courts were supposed to do. *If I deny this and send it up, maybe the Circuit Court will give us some more specific guidelines as to how we are to dispose of these cases where the responsibility lies with the attorney for not pressing the case and not with the client.* (Italics supplied)
>
> "MR. VEASEY: I said in my petition for certiorari in the Glo Co. case that I felt that the case did not set forth the guidelines; it refers to 'unusual circumstances'.
>
> "THE COURT: And you got nowhere with it.

> "MR. VEASEY: I don't know what that means and the Supreme Court apparently did not feel that it was necessary to review that case at that time. So I don't know what the Court of Appeals decision means. I really don't."

The District Court Judge who dismissed Spering's case on September 16, 1969, when ruling on the motion to dismiss, obviously also felt under strong pressure from the appellate court. His last words at the hearing on the motion, Docket # 50, page 4, were:

> "I have had a letter only this morning from Judge Hastie asking why these delays in these old cases. So, you prepare that order and submit it, and I will sign it."

C. The Court of Appeals Provided No Guidelines

Notice of the appeal to the Court of Appeals for the Third Circuit was promptly filed on October 16, 1969 and the case was docketed in the Court of Appeals on November 25, 1969. Briefs on behalf of Spering were filed in the Court of Appeals by Spering's former attorneys, who also argued the case on appeal.

The ruling of the Court of Appeals, in its Opinion dated October 21, 1970 as modified November 13, 1970, provides that "The case insofar as it relates to any claims prior to February 25, 1964 is thus stricken from the docket" and directs the District Court "to limit its inquiry and any award which it might make to services actually performed by appellant for appellee after February 25, 1964". The Opinion provides no guidelines or clarification of the "unusual nature of the circumstances" that caused it to reverse the dismissal in the *Glo Co.* case, supra. It simply states, without explanation, that they "are not present here". The un-

usual circumstances of the former attorney's acknowledged course of misrepresentations and non-disclosures to his client, as well as misleading concealment of the status of the case, are not mentioned in the opinion, although the record before it from the District Court and in such attorney's Briefs to the Court of Appeals establish these facts indisputably.

Shortly after that decision, Spering dismissed his former attorneys and they withdrew on the record. Spering, acting as his own attorney, then filed a timely Petition for Rehearing and Suggestion of Rehearing in Banc with the Court of Appeals on January 13, 1971. On April 19, 1971, the Court of Appeals in banc entered an order denying the Petition for Rehearing, a copy of which appears in the Appendix.

REASONS FOR GRANTING THE WRIT

I

THE DECISION BELOW CONFLICTS WITH MANY DECISIONS OF FEDERAL COURTS THAT REFUSE TO APPLY THE HARSH RULE OF THE SUPREME COURT'S CONTROVERSIAL 4 TO 3 DECISION IN 1962 IN LINK v. WABASH RAILROAD COMPANY, IN CASES OF DISMISSALS OF PLAINTIFFS' SUBSTANTIAL CLAIMS WITHOUT A TRIAL ON THE MERITS BECAUSE OF THEIR ATTORNEYS' FAILURE TO PROSECUTE

The Court of Appeal's Opinion in the instant case is based entirely on the unquestioning, inflexible application of the following harsh statement it quotes from the 4-member ruling Opinion of the Supreme Court in *Link* v. *Wabash Railroad Company*, 370 U.S. 626, 633-634, 82 S. Ct. 1386, 1390, 8 L.Ed. 2d 734, 740 (1962):

> "There is certainly no merit to the contention that dismissal of petitioner's claim because of his counsel's unexcused conduct imposes an unjust penalty on the client. Petitioner voluntarily chose this attorney as his representative in the action,

> and he cannot now avoid the consequences of the acts or omissions of this freely selected agent. Any other notion would be wholly inconsistent with our system of representative litigation, in which each party is deemed bound by the acts of his lawyer-agent and is considered to have 'notice of all facts, notice of which can be charged upon the attorney.' "

That statement as the rule of the *Link* case was highly controversial when written. Justices White and Frankfurter took no part in the decision, and three other Justices dissented. Mr. Justice Douglas dissented, and Chief Justice Warren concurred in a thoroughly-reasoned dissenting opinion by Mr. Justice Black, in which he concluded, at page 649:

> "To my mind, however, it is of very great importance to everyone in this country that we do not establish the practice of throwing litigants out of court *without notice to them* solely because they are credulous enough to entrust their cases to lawyers whose names are accredited as worthy and capable by their government. I fear that this case is not likely to stand out in the future as the best example of American justice." (Italics supplied)

Spering's case is one of many where, indeed, the *Link* case has established just such a practice in some federal courts of "throwing litigants out of court without notice to them", and without a trial on the merits, solely because of their attorneys' defaults.

The *Link* case in only 9 years has been cited, according to Shepard's Citations, in at least 140 cases. It has been reviewed in at least five law journals and the American Bar Association Journal, which generally support the view expressed in Mr. Justice Black's dissent that dismissals without a trial on the merits solely

because of an attorney's defaults constitute harsh and unnecessarily drastic and unjust sanctions when the client has not been given notice of his attorney's default and an opportunity to correct it. The note in *72 Yale Law Journal 826* (1963), for example, concludes at page 832:

> "The *Link* case—highlighted by the drastic nature of the sanction, and the direction of the sanction at an unknowing party who should not be deemed responsible for the misconduct of his attorney—illustrates the need for judicial thought on the subject of standards to govern the use of sanctions at the pretrial conference.
>
> "As the *Link* case demonstrates, the law on the use of sanctions at the pretrial conference phase is developing without the establishment of clearly defined standards. . . ."

Mr. Justice Black and Mr. Justice Douglas have persistently protested the 4-member ruling opinion in the *Link* case on many occasions. Mr. Justice Black has taken the unusual course of writing dissenting opinions in many cases of denials of certiorari where dismissals without a trial had been affirmed by the Court of Appeals: *Lord et al.* v. *Helmandollar et al.*, 383 U.S. 928 (1966); *Riess et ux* v. *Murchison et al.*, 383 U.S. 946 (1966); *Beaufort Concrete Co.* v. *Atlantic States Construction Co.*, 384 U.S. 1004, 86 S. Ct. 1908 (1966), in which he stated at page 1006 "Procedural paper requirements should never stand as a series of dangerous hazards to the achievement of justice through a fair trial on the merits"; *Pittsburgh Towing Co.* v. *Mississippi Valley Barge Line Co., et al.*, 385 U.S. 32 (1966), in which he concluded "The conflict between the interest of the court clerk in the timely filing of papers and the interest of the citizen in having

his lawsuit tried should be reached in favor of the citizen; not the court clerk"; *Berman* v. *U.S.*, 378 U.S. 530 (1964), joined in his dissent by Chief Justice Warren, Mr. Justice Douglas and Mr. Justice Goldberg, concluding "I am uncomfortable with the notion that courts exist to fashion and preserve rules inviolate instead of to apply those rules to do justice to litigants"; *Surowitz* v. *Hilton Hotels Corp.*, 383 U.S. 363, 373 (1966); *Santana et al.* v. *U.S.*, 385 U.S. 848 (1966); and *Morris* v. *Florida*, 393 U.S. 850, 89 S. Ct. 84 (1968), joined in a strong dissent by Mr. Justice Douglas, stating:

> "... the Court once again sanctions the practice of automatically depriving plaintiffs of their lawsuits or defendants of their defenses merely because their lawyers have failed to file some papers within the time required by Court rules. This is a form of *vicarious punishment* against which I have frequently protested in both civil and criminal cases, but in vain ... (listing cases)
>
> "... there is a vast difference between, on the one hand, holding the litigant responsible for errors in not objecting to evidence or pleadings, and, on the other hand, holding the litigant responsible for complete failure to file papers and then without notice to the litigant dismissing his entire case or defense." (Italics and parenthetical material supplied)

Mr. Justice Black dissented from amendments to the Federal Rules being promulgated in a Statement at 383 U.S. 1029 (1966), in which he suggested, at page 1036, that a specific subdivision (c) be added to Rule 41 "as a further guarantee against oppressive dismissals", that would provide:

> "No plaintiff's case shall be dismissed or defendant's right to defend be cut off because of

the neglect, misfeasance, malfeasance, or failure of their counsel to obey any order of the court, unless and until such plaintiff or defendant shall have been personally served with notice of their counsel's delinquency, and not then unless the parties themselves do or fail to do something on their own part that can legally justify dismissal of the plaintiff's case or of the defendant's defense."

A. Other Circuit Courts That Disagree in Principle with the Decision Below

(1) District of Columbia Circuit Court of Appeals

The U. S. Court of Appeals for the District of Columbia in *L. P. Steuart, Inc.* v. *Matthews,* 329 F. 2d 234 (C.A. D.C.—1964), cert. den. 379 U.S. 824, did not follow the hard line of dismissal of the *Link* case. There the District Court had reinstated a personal injury case 2 years after the dismissal for failure of plaintiff's attorney to prosecute, on motion of new counsel based on the ground that previous counsel was grossly negligent. The Court of Appeals noted that previous counsel had been beset with personal problems of serious illness of his wife and recent deaths of his parents. The plaintiff had also made an affidavit that he made "numerous inquiries of" his former counsel who assured plaintiff "from time to time that 'the case was proceeding and that settlement of if would be made soon' ". The court stated "There is no suggestion that there was any foundation for counsel's reassuring statements", and that:

> "On the part of Matthews himself there was no neglect. Cf. U. S. v. Karahalias, 205 F. 2d 331, on rehearing 334 (2d Cir. 1953). Clause (1) of Rule 60(b) is not and clause (6) is broad enough to permit relief when as in this case personal problems of counsel cause him grossly to neglect a dili-

> gent client's case and mislead the client. Clause (6) 'vests power in courts adequate to enable them to vacate judgments whenever such action is appropriate to accomplish justice'. *Klapprott* v. *U.S.*, 335 U.S. 601, 614-615, 69 S. Ct. 384, 93 L. Ed. 266 (1949) . . . In concluding that reinstatement was appropriate to accomplish justice in this case, the District Court did not abuse its discretion."

Judge Prettyman, Sr. C.J., joined Judge Edgerton, Sr. C.J., in that opinion, notwithstanding the fact that Judge Wilbur K. Miller, C.J., dissented in an opinion stating that the majority ruling was contrary to the rule of dismissal in the *Link* case, supra, and also contrary to Judge Prettyman's own dissent in *Barber* v. *Turberville,* 218 F.2d 34 (C.A. D.C.—1954). Judge Miller declared that the majority ruling in that *Barber* case was nullified by the *Link* case that had, in effect, adopted Judge Prettyman's dissent in that earlier case.

The *Steuart* case, supra, is still the rule in the District of Columbia. In *Bibeau* v. *Northeast Airlines, Inc.,* 429 F.2d 212 (C.A. D.C. July 10, 1970), that Court of Appeals *reversed a dismissal* of a plaintiff's wrongful death action for want of prosecution by his attorney, declaring that the District Court Judge abused his discretion and citing the *Steuart* case, supra. The Court of Appeals indicated in that very recent case that *lesser alternate sanctions* should be used, as the 3 dissenters in the *Link* case had, and stated that:

> ". . . the interests of justice require that the dereliction of counsel should not uniformly bar plaintiffs with valid claims from recovery through an inflexible application of the rule. The District Court's recent amendment to Rule 13, made effec-

tive soon after the District Court refused to reinstate the instant case, makes clear that Rule 13 is intended to deal with the errors of attorneys (through reference to the Committee on Admissions and Grievances) and not to punish their clients unnecessarily." (Parenthetical material supplied.)

(2) Second Circuit Court of Appeals

The Court of Appeals for the Second Circuit has also made clear that *lesser alternative sanctions* should be used, again as the dissenters in the *Link* case had. In *Schwarz* v. *U. S.*, 384 F.2d 833 (C.A.-2-1967), that Court of Appeals reluctantly affirmed a dismissal of a personal injury case for failure of counsel to prosecute, stating on page 835:

> "We would, however, suggest that the Court keep in mind the possibility, in future cases of inexcusable neglect by counsel, of imposing substantial costs and attorney's fees payable by offending counsel personally to the opposing party, as an alternative to the drastic remedy of dismissal."

That Second Circuit Court statement of position favoring the *less drastic sanctions* in such cases was quoted and given positive force by that Court of Appeals in the recent case of *Peterson* v. *Term Taxi, Inc.*, 429 F.2d 888 (C.A.-2-June 4, 1970), in which that Court *reversed a dismissal* for failure to prosecute. The Court stated:

> ". . . Nevertheless, as we said in Davis, supra, 'a court must not let its zeal for a tidy calendar overcome its duty to do justice'. 402 F.2d at 331.
>
> "We reiterate that 'the purpose behind close docket control is that of assuring that justice for all litigants be neither delayed nor impaired'.

Winston, supra, 415 Fed. at 621. The trial court's refusal here to reopen a case whose dismissal rested on plaintiff's poor judgment does not comport with those ends, and justice has been impaired by such inflexible attention to the docket. Whatever the merits of plaintiff's case may be, in our opinion justice requires that he be given a fair hearing on his claim."

(3) Fifth Circuit Court of Appeals

Similarly, the Fifth Circuit Court of Appeals supports the view that *lesser sanctions* than dismissal should be employed. In *Flaksa* v. *Little River Marine Construction Co., Inc.,* 389 F.2d 885 (C.A.-5-1968), cert. den. 392 U.S 928, the Court of Appeals stated:

"We are fully aware of the impelling need for cooperation from parties and attorneys to keep litigation on congested dockets moving; but except in extreme circumstances, the court should first resort to the wide range of *lesser sanctions* which it may impose upon the litigant or the derelict attorney, or both (Italics supplied)

* * * *

". . . The appellant was in no way connected with, or responsible for, his proctor's dilatory conduct. While we do not condone that conduct, we feel that the circumstances are not such that the appellant should lose his day in court."

The Fifth Circuit Court has most recently confirmed that rule favoring *lesser sanctions* than dismissal in *Brown* v. *Thompson,* 430 F.2d 1214 (C.A.-5-August 6, 1970), where it *reversed a dismissal* with prejudice. The Court quoted from its decision in *Flaksa, supra,* and then stated:

"In the decided cases it is recognized that the dismissal of a case with prejudice is a drastic

remedy to be used only in those situations where a *lesser sanction* would not better serve the interests of justice." (Italics supplied)

(4) Other Recent Authority

Moore's Federal Practice Rules Pamphlet of 1971 at page 827, under Rule 41 of the Federal Rules of Civil Procedure, cites *Meeker* v. *Rizley;* 324 F. 2d 269 (C.A. 10—1963) as authority for its statement that dismissal is too drastic for failure to attend a pretrial conference. In the District Court for the District of Rhode Island, the court in *King* v. *Mordowanec,* 46 F.R.D. 474 (D.C. R.I.—1969) announced in footnote 5:

> "Hereafter, beginning with April Term 1969, it will be the practice of this court to notify clients, where possible, of their lawyer's dilatoriness in cases such as this and to use the fine as a means of enforcing the court's rule rather than the use the dismissal as a means of visiting upon the innocent client the sins of his attorney. Indeed, the court is inclined to consider the use of an assessment of defendant's costs, in preparing and presenting these motions, against plaintiff's original attorney, if defendant chooses to pursue such a ruling."

B. The Decision Below Follows the Link Case Inflexibly, Conflicts With Other Courts of Appeals in Principle, Provides No Guidelines, and Ignores the Former Attorney's Acknowledged Infidelity.

Thus, the above Circuit Courts of Appeals appear clearly to have developed their own more just rule, finally rising above the confusion and widespread injustice caused by the *Link* case's unfortunate blanket blessing on all dismissals for attorneys' defaults at the unlimited discretion of District Court judges. The Third Circuit Court of Appeals, however, in the instant case continues the confusion and injustice caused by the

Link case. It has even added an element of special discrimination against lawyers as non-resident litigants. The District Court in the instant case plainly asked the Court of Appeals for some "guidelines" and a clarification of the "unusual nature of the circumstances" that it had said led to its reveral of the dismissal in the *Glo Co.* case, *supra,* where the case had been pending for 12 years, not 4 years as in the present case, there had been frequent periods of inactivity of record for more than one year, and repeated warnings and orders by the court to show cause why the case should not be dismissed. But the Court of Appeals made no attempt to provide any possible guidelines, and merely created greater mystery around the magic words "unusual nature of the circumstances" by stating that they "are not present here", with no explanation or reference to any specific unusual circumstances of either case.

Indeed, the Court of Appeals completely ignored the undenied facts of misrepresentations made to Spering by his attorney, as shown in his affidavits in the record below, Docket # 45, and reasserted in the transcript of the oral argument, Docket # 49, on the plaintiff's motion for reargument. The Court of Appeals made no mention of the fact that Spering's attorney did not deny any of these misrepresentations. Moreover, the Court completely ignored the confirmation by Spering's attorney of all those undisputed facts made in the following statements in his Appellant's Brief and in his Appellant's Reply Brief filed in the Court of Appeals:

In Appellant's Brief, page 9:

> "A brief review of the plaintiff's affidavit of September 20, 1969 or September 22, 1969 and his oral presentation to Judge Wright on October 16, 1969 (Tr. Hearing, J. Wright pp. 13-32, A-115

through A-134), make it abundantly clear that the plaintiff individually had no awareness that the pending action was in jeopardy for failure to prosecute. The very detailed statement of the plaintiff's individual efforts to urge prosecution and the information received by him from his counsel make the conclusion inescapable that any delay in prosecution is solely attributable to plaintiff's counsel rather than to plaintiff himself. There is nothing whatever in the record to indicate that the plaintiff had any knowledge of, or participation in, any failure to prosecute this action. Indeed, plaintiff personally believed, that defendant was responsible for delaying plaintiff's discovery proceedings until mid-December, 1968. See also affidavits, Docket # 45, A-79 through A-100."

Again, in Appellant's Reply Brief, page 8, plaintiff's former attorney acknowledged some of the most critical information he had given plaintiff over a period of years, as follows:

"From March 28, 1967 until December 20, 1968, a period of twenty-one (21) months, Spering personally believed, from information received from his attorney, that defendant was responsible for delaying that examination of defendant's records. He understood that defendant had not yet completed consolidating all such files and records from Houston and New York at one location and had not yet determined which papers did not relate to plaintiff that defendant might refuse to allow to be examined. See page 6 and preceding pages of plaintiff's affidavit dated September 20, 1969, Docket # 45 A-93, and plaintiff's statements to the Court at the Hearing on October 16, 1969, pages 13-32, Docket # 49, A-115 through A-134.

* * * *

"The truth of the matter is that plaintiff personally never even saw those answers filed by de-

> fendant to interrogatories and never knew of their contents until September 22, 1969, after Judge Steel's order of dismissal of the case. See paragraph 5 on page 2 of plaintiff's affidavit dated October 14, 1969, Docket # 45, A-80."

The quotation, in the Court's Opinion, from Spering's letter to his former attorney almost six months prior to the order of dismissal, by omitting certain words from the sentence, creates an erroneous sense not really there. The full sentence was "I fear that so much time has gone by without action on our part that we have probably already prejudiced *our negotiative position in the case, if not also* our position before the court". The words in italics were omitted by the Court. The omitted words, "if not", suggest that it was "slightly possible to have been prejudiced before the court" or "possibly in time to be prejudiced before the court though *not* yet". They certainly do not suggest that the writer was aware of any real, imminent, and serious prejudice before the court. Spering had only in mind the possibility that the District Court might fix a date by which discovery would have to be completed, which would not allow adequate time to complete the full discovery that he believed needed in the best interest of satisfactory prosecution of his case. The full test of that letter appears in the Appendix.

In the first paragraph of its Opinion, the Court of Appeals acknowledges that Spering's "claim might ultimately have had some *substantial merit.*" (Italics supplied). Consequently, in affirming the dismissal of his case in substantial part, the Court contravenes without discussion a number of its own decisions which have reversed such dismissals for attorneys' defaults

in matters *involving substantial claims.* See *Dyotherm Corporation* v. *Turbo Machine Company,* 392 F. 2d 146 (C.A.-3-1968); *Glo Company* v. *Murchison and Company,* 397 F. 2d 928 (C.A.-3-1968), cert. den., 89 S. Ct. 290, 393 U.S. 939 (1968); and *Viking Theatre Corp.* v. *Paramount Film Distributing Corp.,* 362 F. 2d 980 (C.A.-3-1966). *Thus,* it seems reasonable to surmise that the Court of Appeals may have been influenced in its decision in Spering's case by its own desire to receive *some guidelines* from the Supreme Court.

2. UNDER THE LAW OF AGENCY A PLAINTIFF CANNOT BE BOUND BY HIS ATTORNEY'S ACTION OR INACTION WHEN CONTRAVENING HIS AGENCY, AND THE RESULT OF HIS INACTION IS BEYOND HIS AUTHORITY.

A. A Breach of Agency by the Agent Suspends the Relationship

An attorney is bound to the highest duty of fidelity, honor, fair dealing and full disclosure to a client. *Udall* v. *Littell,* 366 F. 2d 668, 125 U.S. App. D.C. 89 (1966), cert. den. 87 S. Ct. 713, 385 U.S. 1007, 17 L. Ed. 2d 549, rehearing denied 87 S. Ct. 952, 386 U.S. 939, 17 L. Ed. 2d 812. As an attorney himself, Spering has been more aware of these high standards of fidelity to client required of attorneys than a layman would be expected to be. Spering therefore believed that all that his attorney told him was true, and that all pertinent information concerning the status of his case was being currently provided to him by his attorney. Consequently, the Court of Appeals' statement that the harsh rule of dismissals under the *Link* case should be "more strongly applicable" to a lawyer-litigant than to a layman is as discriminatory and unjustified as the rule is harsh and defeative of justice between the parties in the case. This is especially so when the rule itself is

based on a theory of the existence of an agency of the lawyer for his client.

Under the law of agency, if the agent steps aside from the business of his principal to promote purposes of his own, the relation of agency is for the time being and to that extent suspended. *Silverado S.S. Co.* v. *Prendergast,* 31 F.2d 225, (C.A.-9-1929). See article in *45 A.L.R. 2d 14* re bad faith or fraudulent conduct of attorney. A client would not be bound by the acts of his attorney if the client alleges and proves his attorney's misconduct amounting to a breach of legal duty faithfully to represent his client. *Williams* v. *Beto,* 354 F.2d 698 (C.A.-5-1965). The case of *Fretz* v. *Stover,* 89 U.S. 198, 206, 22 Wall. 198, 206, 22 L.Ed. 769, 771 (U.S. Va. 1875) has been cited for the proposition that clients are not bound by the wrongful acts of their attorneys. Also one who seduces an agent to betray his principal or an attorney his client, can hold none of the fruits of his bargain. *Barnett* v. *Kunkel,* 259 F. 394, 170 C.C.A. 370 (C.A.-10-1919).

B. An Attorney Cannot Accomplish by Default a Dismissal of His Client's Case, Which He Cannot Accomplish Directly Without Express Authority

An attorney employed to prosecute an action has no general or implied authority to compromise or dismiss the action with prejudice or to stipulate in such manner as to surrender substantial rights. *Whitebird* v. *Eagle-Picher Co.,* 258 F.Supp. 308 (D.C., Okla. 1966). An attorney of record may not compromise, settle, or consent to final disposition of his client's case without express authority. *Thomas* v. *Colo. Trust Deed Funds, Inc.,* 366 F.2d 136 (C.A.-10-1966), citing 7 C.J.S., Atty & Client, # 86 and # 105a. *Preveden* v. *Hahn,* 36

F.Supp. 952 (D.C. N.Y.-1941). *Gallegos* v. *Turner,* 256 F.Supp. 670 (D.C. Utah-1966). See also *Note in 56 A.L.R. 2d 1290,* annotating with approval *Virginia Concrete Company* v. *Board of Supervisors,* 197 Va. 821, 91 S.E. 2d 415, 56 A.L.R. 2d 1283 (1956), which cites on page 1292 cases in 14 different jurisdictions to the effect that special authorization is necessary for such purposes. Further, that A.L.R. Note states, among other things:

> "Where an action is dismissed or otherwise terminated at the instance of an attorney acting without proper authority, the client is ordinarily entitled to have the order or judgment set aside and the cause reinstated." (citing cases in 8 different jurisdictions), at page 1299.

In the dissenting opinion of Mr. Justice Black, concurred in by Chief Justice Warren, in the *Link* case, supra, it is stated at page 646,

> "There surely can be no doubt that if the plaintiff's lawyer had gone into court without authority and asked the court to dismiss the case so as to bar any future suit from being filed, this Court would repudiate such conduct and give the plaintiff a remedy for the wrong so perpetrated against him."

More recently, in *McKinney* v. *Boyle,* 404 F.2d, 632 (C.A.-9-December 18, 1968) cert. den. 89 S. Ct. 1481 (1969), a personal injury action was dismissed by a plaintiff's attorney in his absence allegedly by "fraud" on the part of the attorney and the plaintiff's former wife. Based on plaintiff's affidavit, he never agreed to any settlement nor gave any authority to his wife or anyone to settle for his injuries, and never received any proceeds of any settlement. The Court of Appeals, citing the *Klapprott* case, supra, and the *Steuart* case,

supra, among others, ruled that this brings plaintiff within ground (6) of Rule 60(b) F.R.C.P. as to which there is no fixed time limit for a motion to vacate the earlier dismissal of his case, and ruled that the dismissal should be vacated.

The infidelity of Spering's former attorney in this case seems totally inexplicable. In fact, the attorney himself had no explanation to give to the District Court when confronted with it at the hearing October 16, 1969. But then sometimes lawyers do some curious things. Indeed, it seems curious that TB&C's attorneys in the instant case, John R. Hupper, Esq., and his firm, Cravath, Swaine & Moore, of New York, and the firm of Richards, Layton & Finger, of Wilmington, Delaware, knowing of the gross and critical neglect of Spering's case by a senior trial lawyer in the Wilmington, Delaware law firm, Morris, James, Hitchens & Williams, whose representation of Spering resulted in dismissal of his case with prejudice, should recently have brought in the firm of Morris, James, Hitchens & Williams to represent Shell Oil Company a defendant in a derivative action by stockholders of Shell Oil Company against the Royal Dutch/Shell Group, its affiliates Asiatic Petroleum Corp. and Shell Petroleum, N.V., and Monroe E. Spaght (a former president of Shell Oil Company), all of whom were represented by John R. Hupper, Esq. and his firm, Cravath, Swaine & Moore, and against certain other individual defendants (officers of one or more of the defendant companies), represented by Richards, Layton & Finger. This alignment of counsel for defendants and the fact that 69% of the stock of Shell Oil Company is owned or controlled directly or indirectly by the Royal Dutch/Shell Group, appear in the reported case of *Halpern* v. *Bar-*

ran et al., 272 A. 2d 118 (Court of Chancery, Delaware —December 15, 1970). The selection of Morris, James, Hitchens & Williams, and not Richards, Layton & Finger, to represent Shell Oil Company in that case seems the more curious since the firm of Richards, Layton & Finger has represented Shell Oil Company at least once in the past, in *Petition of Shell Oil Company*, 203 A. 2d 845 (Superior Court of Delaware, in a rezoning case—September 29, 1964).

3. THIS CASE INVOLVES CRITICAL ELEMENTS IN MATTERS OF DISMISSALS WITHOUT A TRIAL FOR ATTORNEYS' DEFAULTS FOR WHICH GUIDELINES ARE NEEDED FROM THE SUPREME COURT.

The cases reviewed above suggest that some Courts of Appeals have been developing some guidelines to be followed in lieu of automatic, inflexible dismissals of substantial claims for attorneys' defaults in the unlimited discretion of District Court trial judges pursuant to the *Link* case, supra. Essentially all of the critical elements considered in those developing guidelines are present in the instant case.

One significant element appears to the petitioner to be of underlying importance where, as here, jurisdiction in the federal court is based upon diversity of citizenship. Plaintiffs in such cases are most often non-residents living considerably more than a hundred miles from the jurisdiction of the court. In such cases plaintiffs need greater protection of their rights against defaults of their attorneys under local court rules and practices. Not only are plaintiffs unfamiliar with such rules and practices and the dependability of the various local attorneys, but even their own non-resident attorneys are forced to depend on local attorneys for performance in accordance with local District Court Rules

and practices. This case emphasizes the vulnerability of such non-resident plaintiffs under local court rules and practices, since even a plaintiff who is a lawyer has been unwittingly victimized under such local rules in a case of great importance to him and his family. It involves full, fair compensation for more than 10 years of service for TB&C, a quarter of a normal professional lifetime of services, that called upon his unique knowledge and skills developed over a preceding period of nearly 12 years.

Some of the elements of the guidelines that have been developing in some Courts of Appeals, petitioner believes, may be summarized somewhat as follows:

1. Where gross or inexcusable neglect or misconduct of an attorney, or incorrect and misleading information from an attorney to his client, coupled with persistent concealment of the truth, have occurred, the agency of the attorney is breached, and/or is non-existent or suspended, during such periods, so that a plaintiff cannot justly be charged by a court with dismissal consequences because of his attorney's critical defaults. Rule 60 (b)(6) F.R.C.P. contemplates that a plaintiff shall be entitled to relief from any consequent dismissal of his case in any of such cases where the plaintiff himself is without knowledge of the critical nature or extent of his attorney's defaults and has not participated in them.

2. Dismissals with prejudice without a trial on the merits, where some relevant facts remain in dispute to be resolved by trial, are abhorrent as unjust denials of a party's property interest in his cause of action, and should not be entered, or should be vacated, where the plaintiff himself has not participated in the critical

defaults of his attorney and has not received notice of the critical nature of his attorney's defaults, and has not been afforded a reasonable opportunity to correct such defaults and proceed with the case.

3. An attorney for a plaintiff cannot, by neglect, misrepresentation, or fraud, achieve a dismissal with prejudice of his client's case without a trial on the merits for his failure to prosecute, a result which attorneys do not have any general or implied authority to achieve by formal action, by agreement or stipulation on the record, without express authority to do so from their clients.

CONCLUSION

For these reasons, a writ of certiorari should issue to review the judgment and opinion of the Third Circuit Court of Appeals.

Respectfully submitted,

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Attorney for Petitioner
Acting for Himself

July 19, 1971

APPENDIX

APPENDIX

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434 F. 2d 677

UNITED STATES COURT OF APPEALS
FOR THE THIRD CIRCUIT

No. 18,358

HOWARD S. SPERING, *Plaintiff-Appellant*,

v.

TEXAS BUTADIENE & CHEMICAL CORPORATION,
a Dissolved Delaware Corporation, *Defendant-Appellee*.

(D.C. Civil Action No. 3047)

APPEAL FROM THE UNITED STATES
DISTRICT COURT FOR THE DISTRICT OF DELAWARE

Argued May 18, 1970

Before ALDISERT, ADAMS, *Circuit Judges* and
HIGGINBOTHAM, *District Judge*

Opinion of the Court

(Filed October 21, 1970)

(as modified by Order November 13, 1970)

HIGGINBOTHAM, *District Judge*.

We are asked to decide whether the District Court abused its discretion in dismissing plaintiff-appellant's case with prejudice under a Local Rule which provides for dismissal of cases in which, without good reason, no action has been taken for a period of one year.[1] We conclude that the Dis-

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[1] Civil Rule 12 of the United States District Court for the District of Delaware provides:

> "Subject to the provisions of Rule 23(c), F.R.C.P., in each cause pending, wherein no action has been taken for a period of one year, the Court may, on its own motion or upon application of any party and after reasonable notice, enter an order

trict Court did not abuse its discretion. We do so fully mindful that appellant's claim might ultimately have had some substantial merit.

I. *History of the Case in Court.*

Plaintiff-Appellant Howard Spering's three-count complaint was filed on June 25, 1965. In twenty paragraphs appellant detailed a series of legal actions undertaken on behalf of defendant-appellee Texas Butadiene & Chemical Corporation (hereinafter "TB&C") from 1954 through 1964 and for which he was allegedly not fully compensated. Invoking breach of contract, unjust enrichment, and quantum meruit theories of recovery, appellant asked for judgment in the amount of $901,322.83, plus interest, costs, and counsel fees.

TB&C filed its amended answer on January 17, 1966. In addition to ten affirmative defenses, the amended answer avers that "defendant has paid plaintiff in full for all services rendered . . . with the exception of services rendered after February 25, 1964, with respect to which defendant has paid $6,000.00 on account, but as to which plaintiff has not yet submitted a final statement."

TB&C filed twenty-one interrogatories to plaintiff on December 14, 1965. Plaintiff objected to interrogatories 2, 4, and 6 through 21. On July 29, 1966 Chief Judge Wright overruled plaintiff's objections subject to a limitation, and plaintiff filed his answers on October 2, 1966.

The remainder of 1966 saw no further record action taken in the lawsuit. Nor was any record action taken in all of 1967. It was only on February 1, 1968—one year and four months less a day after plaintiff last acted in the

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dismissing such cause unless good reason for the inaction is given. An application for continuance shall not be deemed to be action precluding such dismissal. After any such application for dismissal has been filed, no application for a continuance or any proceeding taken under the discovery rules, F.R.C.P., shall be deemed to toll the application of this Rule."

lawsuit—that Spering filed four interrogatories to TB&C. No official notice was made of this first delay in excess of one year. TB&C completed its answers to plaintiff's interrogatories on May 21, 1968.

On August 2, 1968 Civil Action No. 3047, *Howard Spering* v. *Texas Butadiene & Chemical Corporation* was more than three years old. Accordingly, pursuant to Local Rule 3 of the District Court for the District of Delaware, plaintiff was asked on that day to file with the Clerk of the Court "a statement in sufficient detail explaining why the case has not proceeded more expeditiously." [2]

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[2] The full text of Local Rule 3 of the United States District Court for the District of Delaware is as follows:

"Rule 3. Calls of Calendar; Dismissal for Failure to Prosecute; Three-year Cases.

"There shall be a calendar call at the beginning of each term. The calendar shall consist of all cases in which, as of July 1 of the year in which the calendar is called, no action has been taken by the parties or their counsel for a period of one year (one-year cases), and of all cases which, as of July 1, have been pending for a period of three years (three-year cases).

"On or before the 20th day of August, the Clerk shall send a copy of the calendar and notice of this Rule to all counsel whose names appear in said calendar, or if no counsel appear, to the parties at their last known address. Such mailing shall be deemed good and sufficient notice of the provisions below.

"Subject to the provisions of Rule 23, F.R.C.P., counsel or the parties, in the one-year cases, shall appear at the call of the calendar and show cause, if any they have, why the case should not be dismissed. If counsel or the parties fail to appear or show cause why the case should not be dismissed, an order of dismissal shall be entered by the Court.

"Counsel or the parties in the three-year cases shall, before the first Tuesday in September, file with the Clerk in duplicate a statement in sufficient detail explaining why the case has not proceeded more expeditiously.

"Thereafter the Court may take such action if any, as appears warranted."

In a response dated September 3, 1968 counsel could "only suggest that the plaintiff himself is an attorney actively engaged in the practice of law in Washington, D.C., the period of time during which the claim asserted by the plaintiff arose extends over a period of years, and a great number of documents, memoranda and correspondence had to be reviewed from time to time as the case proceeded." By way of conclusion, plaintiff's attorney stated: "Plaintiff intends to proceed at this point more expeditiously in preparation for the trial of this case." Defendant's letter to the Clerk of the Court stated defendant's position that "it is incumbent upon plaintiff to move the case along promptly or dismiss it." The District Court took no action at that time.

Another eleven months passed without a single record action in the case. More than a year and a half had passed since plaintiff had filed four interrogatories on February 1, 1968, and with the exception of these four questions answered in May of that year, no record action had been taken by plaintiff to advance his case in thirty-four months. As in 1968 also in 1969, the Clerk of the Court, pursuant to Local Rule 3,[3] called upon plaintiff to explain why his case had not proceeded more expeditiously. Pending for three years, plaintiff's case was now also one in which no action had been taken for a period of one year (for the second time). Plaintiff had therefore to show cause why the case should not be dismissed.

On August 6, 1969 defendant moved to dismiss plaintiff's case, basing its motion in part on Local Rule 12.[4] In a letter to the Clerk of the Court, with copies to Chief Judge Wright, Judge Steel, and counsel for Spering, defendant stated its intention to "bring its motion to dismiss to the attention of the Court at the Call of the Calendar" scheduled for September 16, 1969.

---

[3] See text of Rule above, p. 3.

[4] See text of Rule above, p. 1.

Plaintiff Howard Spering, himself a lawyer, was not unaware of the dangerous drift that had set in for some time in the prosecution of his case. In a letter to his attorney dated March 26, 1969 Spering noted that "months have gone by without our moving forward in our case against Texas Butadiene & Chemical Corporation." "I fear," he continued, "that so much time has gone by without action on our part that we have probably already prejudiced our negotiative position in the case, if not also our position before the court." [Letter attached to affidavit filed October 15, 1969, Docket Entry No. 45.]

At the Call of the Calendar on September 16, 1969 the following exchange took place between Judge Steel and the attorney for plaintiff Spering:

> "The Court: This case was begun in June of 1965. That is four years ago. The last action was taken on May 21, 1968."
>
> "(Plaintiff's attorney): Yes."
>
> "The Court: Now, I read the letter of explanation for this delay. One reason given was extensive research relating to legal defenses. Now these defenses were raised in an amended answer filed in January of 1966, more than three years ago. Now the defenses can't have been so complex that for three years they required extensive research."
>
> "(Plaintiff's attorney): No, sir, but the answers to interrogatories that Defendant made in May of 1968 set forth information relating to those defenses."
>
> "The Court: Well, why weren't the interrogatories filed before that? Here was an answer which told you what you were going to have to meet in January of 1966 and you waited until some time in 1968 to find out the facts you needed. I think it is inexcusable. I think there is no justifiable cause shown for the delay, and under the one-year rule I shall dismiss the action and I shall grant the motion to dismiss." [Notes of Testimony, Call of Calendar, Docket Entry No. 50, p. 3.]

On September 16, 1969, Judge Steel ordered Spering's action dismissed with prejudice. Plaintiff moved for reargument, and plaintiff and counsel for the defendant filed affidavits with the Court. On October 16, 1969 Chief Judge Wright heard reargument, which he considered as argument on a motion to vacate Judge Steel's order of dismissal. The Chief Judge stated that he considered it his duty "to examine the record and consider what Judge Steel did, and if I find anything in there that I would think was an abuse of discretion by Judge Steel . . . do something about it. Absent that, the ruling will stand." Notes of Testimony, Reargument October 16, 1969 p. 2. At the conclusion of the reargument, having heard counsel for both plaintiff and defendant as well as the plaintiff himself and having examined the total record, Chief Judge Wright denied plaintiff's motion. The dismissal of Civil Action No. 3047 became final and this appeal followed.

II. *There has been no Abuse of Discretion; the Order of Dismissal will be Affirmed.*

Dismissal of a lawsuit for inaction is clearly within the sound discretion of the federal district court. *Link* v. *Wabash Railroad Company,* 370 U.S. 626, 82 S. Ct. 1386 (1962). Absent a clear abuse of discretion by the district court, we will not reverse the court's order of dismissal. *Kenny* v. *California Tanker Company,* 381 F.2d 775 (CA3, 1967). In determining that there has been no such abuse of discretion in the instant case, we have carefully considered all of the circumstances and the entire record of the matter.

As our extensive recital of the history of the case has indicated plaintiff is himself a lawyer and as such not unaware of the importance of exercising rights timely. Just as the failure to comply with the statute of limitations might extinguish an otherwise valid right so are there perils from extended inaction in the conduct of a lawsuit.

Indeed in plaintiff's letter to his attorney almost six months prior to the order of dismissal he expressed the "fear that so much time has gone by without action on our part that we have probably already prejudiced . . . our position before the court."

Appellant argues that "this is not . . . (his attorney's) lawsuit, it is Mr. Spering's lawsuit;" and that "any delay in the prosecution of the claim has not been Mr. Spering's responsibility, it has been (plaintiff's lawyer's) responsibility." The effect of the dismissal, appellant concludes "is to invoke a severe and harsh penalty upon a plaintiff who himself has not been, if you will, guilty of any conduct that caused delay in the prosecution." [Notes of Testimony, Reargument pp. 8 and 9, Docket Entry No. 49.] To this contention the Supreme Court of the United States replied:

> "There is certainly no merit to the contention that dismissal of petitioner's claim because of his counsel's unexcused conduct imposes an unjust penalty on the client. Petitioner voluntarily chose this attorney as his representative in the action, and he cannot now avoid the consequences of the acts or omissions of this freely selected agent. Any other notion would be wholly inconsistent with our system of representative litigation, in which each party is deemed bound by the acts of his lawyer-agent and is considered to have 'notice of all facts, notice of which can be charged upon the attorney.'" (Citation omitted) *Link* v. *Wabash Railroad Company,* 370 U.S. 626, at 633-634, 82 S. Ct. 1386, at 1390.

Where plaintiff is himself an attorney the Supreme Court's words are the more strongly applicable.

The validity of Local Rule 12 of the United States District Court for the District of Delaware is unchallenged here. The Rule provides that in a case where no action has been

taken for a period of one year the Court may, after reasonable notice, dismiss such case unless good reason for the inaction is given. Appellant has been given full and fair opportunity to explain his inaction. At reargument before Chief Judge Wright appellant's attorney stated:

> "it doesn't excuse the prosecution of the claim that some admitted amount is due and owing nor the neglect, if you will, in pursuing the claim."

* * *

In response to the Court's question, "did you make any effort to ever get (the documents involved in this dispute)," appellant's attorney could only say: "No, sir." (p. 9)

* * *

The Chief Judge stated that he could not understand how appellant's lawyer "could let a case ostensibly involving this much money simply lay in your office without any activity, especially after you had been warned a year ago that some action had to be taken, and when you promised the court that some action would be taken." Appellant's attorney could only reply: "Well I regret to say to Your Honor that I cannot give you a satisfactory explanation." (pp. 9, 10)

Two judges of the District Court considered appellant's arguments and did not find in them the "good reason for the inaction" required by Rule 12. We have passed over the same ground and more and are also satisfied that there has been no abuse of discretion. Reversal of the District Court's order of dismissal is unwarranted.

One last matter merits discussion. Appellant has relied heavily on *Glo Company* v. *Murchison and Company,* 397 F.2d 928 (CA3, 1968), cert. den. 89 S. Ct. 290, 393 U.S. 939 (1968). In its first opinion reversing an order of dismissal this court relied heavily on the fact that "there appears to be no dispute that an amount of money is owed to plaintiff under the contracts in suit." (at p. 929). In a

later opinion on rehearing this court said: "after consideration of the complex factual circumstances of the case, we conclude with the greatest reluctance that in view of the unusual nature of the circumstances of this case the interest of justice will best be served by affording plaintiff an opportunity to prove its case at trial."

Taking the opinions in reverse order, we conclude that the "unusual nature of the circumstances" in *Glo Company* are not present here. There is in this suit however, "no dispute that an amount of money is owed to plaintiff." As noted above TB&C admitted in its amended answer that it had not paid plaintiff for services rendered after February 25, 1964. TB&C has often renewed its promise to pay plaintiff upon receipt of a bill (see appellee's brief, p. 26) and has paid $6,000.00 on account. We will sustain the Order of Dismissal entered by the District Court below. The case insofar as it relates to any claims prior to February 25, 1964 is thus stricken from the docket.

At the same time we will allow appellant to pursue his claim for services admittedly rendered to appellee after February 25, 1964. The District Court is directed to limit its inquiry and any award which it might make to services actually performed by appellant for appellee after February 25, 1964.

The case is remanded to the District Court with instructions to modify its Order of Dismissal and to proceed as to the admitted claim in accordance with this Opinion.

A True Copy:

Teste:

Clerk of the United States Court of Appeals for the Third Circuit.

UNITED STATES COURT OF APPEALS
FOR THE THIRD CIRCUIT

No. 18,358

HOWARD S. SPERING, *Plaintiff-Appellant,*

v.

TEXAS BUTADIENE & CHEMICAL CORPORATION, a Dissolved Delaware Corporation, *Defendant-Appellee.*

Sur Petition for Rehearing

Present: HASTIE, *Chief Judge,* and SEITZ, VAN DUSEN, ALDISERT, ADAMS, GIBBONS and ROSENN, *Circuit Judges,* and HIGGINBOTHAM, *District Judge.*

The petition for rehearing filed by HOWARD S. SPERING, Plaintiff-Appellant, in the above entitled case having been submitted to the judges who participated in the decision of this court and to all the other available circuit judges of the circuit in regular active service, and no judge who concurred in the decision having asked for rehearing, and a majority of the circuit judges of the circuit in regular active service not having voted for rehearing by the court in banc, the petition for rehearing is denied.

By the Court,

WILLIAM H. HASTIE
Chief Judge

Dated: April 19, 1971

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF DELAWARE

Civil Action No. 3047

HOWARD S. SPERING, *Plaintiff*,

v.

TEXAS BUTADIENE & CHEMICAL CORPORATION, a dissolved Delaware corporation, *Defendant*.

Order

WHEREAS this action was commenced on June 25, 1965 and defendant amended its answer on January 17, 1966;

WHEREAS no action has been taken for a period of more than one year; namely, no action has been taken since the filing by defendant of its answers to plaintiff's interrogatories on May 21, 1968;

WHEREAS defendant has moved to dismiss this action under Rule 12 of the Rules of this District on the ground that no action has been taken for a period of one year and on the ground that plaintiff has failed to prosecute this action;

WHEREAS said motion was duly presented to the Court and counsel for the parties were heard in support thereof and in opposition thereto; and

WHEREAS plaintiff has failed to show good reason for the inaction in accordance with Rule 12 of the Rules of this District;

IT IS ORDERED this 16th day of September 1969 that the motion of the defendant is granted and this action is dismissed with prejudice, costs to be paid by plaintiff.

/s/ EDWIN D. STEEL, JR.
Judge

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF DELAWARE

[Caption Omitted]

Order

THIS 16th day of October 1969, the Court having dismissed the above action with prejudice by order dated September 16, 1969 and filed September 17, 1969, and plaintiff having filed a motion on September 22, 1969, entitled "Plaintiff's Motion for Reargument" and defendant having filed its answer pursuant to Rule 16 of this District, and the Court having further considered said motion upon a hearing in open court in which counsel for the plaintiff and counsel for the defendant as well as the plaintiff himself were fully heard, and the Court having considered the entire record in this matter,

IT IS ORDERED that "Plaintiff's Motion for Reargument" is hereby denied.

/s/ CALEB M. WRIGHT
Chief Judge

LAW OFFICES
HOWARD S. SPERING

March 26, 1969

Arthur J. Sullivan, Esquire
Morris, James, Hitchens & Williams
701 Bank of Delaware Building
Wilmington, Delaware 19801

Dear Art,

So many of my telephone calls to you have not been completed, and months have gone by without our moving forward in our case against Texas Butadiene & Chemical Corporation. I fear that so much time has gone by without action on our part that we have probably already preju-

diced our negotiative position in the case, if not also our position before the court.

As you know, I have been holding myself ready for long periods at a time in order to be able to meet your convenience and the convenience of the attorneys for the defendant in New York. If my recollection is correct, it has now been more than two years since we made demand upon the defendant to permit us to examine the defendant's books and records, and it still has not been done.

I have not been responsible for any of this delay and I have pushed continually to go forward. All of this has been quite costly to me because I have had to avoid making some long-term commitments of my time to other matters.

I am sure you will agree that it is absolutely essential that we proceed with this case promptly. If you continue to find yourself so tied up with other matters that you cannot give this case the prompt attention that it must have, I think you must be frank with me and volunteer to withdraw from the case. If this is going to be your situation, you must put me in a position that I shall at least be able to seek counsel who can give the matter prompt attention.

Please let me hear from you.

Sincerely,

/s/ HOWARD
Howard S. Spering

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Supreme Court, U.S.
FILED
AUG 19 1971
ROBERT SEAVER, CLERK

IN THE

Supreme Court of the United States

October Term, 1971.

~~No. 99.~~

HOWARD S. SPERING,

Petitioner,

v.

TEXAS BUTADIENE & CHEMICAL CORPORATION,

Respondent.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Third Circuit.

BRIEF IN OPPOSITION.

Of Counsel:
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THE OPINION BELOW.

The Opinion of the Court of Appeals for the Third Circuit (P 1a) is reported at 434 F. 2d 677.[1]

COUNTERSTATEMENT OF QUESTIONS PRESENTED.

Should this Court review the narrow question of whether or not the Court of Appeals correctly decided that the District Court had not abused its discretion in dismissing this civil action for lack of prosecution under a valid local rule permitting dismissal for unjustified inaction of a year or more, where the petitioner, himself a lawyer and a member of the Bar of this Court, took no substantial action while the case languished in the District Court for four years, where absolutely no action was taken for over a year in the face of a warning of prejudice from lack of prosecution, where petitioner admittedly was aware of the consequences of such inaction, where no reasonable excuse was offered for the failure to prosecute, where two judges in the District Court fully considered all the facts and heard petitioner personally, where the claim itself was palpably lacking in merit and where the Court of Appeals considered the full record of the case in the light most favorable to petitioner and affirmed the dismissal and denied reargument?

---

1. "P" refers to the Petition for Writ of Certiorari and the Appendix thereto.

COUNTERSTATEMENT OF THE CASE.

The Petition requests this Court to review a determination of the United States Court of Appeals for the Third Circuit affirming an order of the United States District Court for the District of Delaware dismissing petitioner's case under a Local Rule[2] permitting such dismissal for unjustified lack of activity for over a year and for failure to prosecute under Rule 41(b) F. R. C. P. Both Courts below reviewed the entire record of the case and all of the matters presented by the petitioner.

There is no dispute that the District Court had the power to dismiss the case under the Local Rule and under Rule 41(a) F. R. C. P. There is no dispute that such dismissal is within the sound discretion of the District Court. There is no dispute that the Court of Appeals correctly applied the appropriate scope of review in determining whether or not the District Court had abused its discretion.

Petitioner merely reargues the discretionary acts of two District Court Judges and the Court of Appeals. Respondent respectfully submits that this case is not one of importance for consideration by this Court and that the facts and the law clearly demonstrate that both the District Court and the Court of Appeals were correct in the decision rendered.

---

2. "RULE 12. DISMISSAL OF ACTIONS FOR FAILURE TO PROSECUTE.

Subject to the provisions of Rule 23, F. R. C. P., in each cause pending, wherein no action has been taken for a period of one year, the Court may, on its own motion or upon application of any party and after reasonable notice, enter an order dismissing such cause unless good reason for the inaction is given. An application for a continuance shall not be deemed to be action precluding such dismissal. After any such application for dismissal has been filed, no application for a continuance or any proceeding taken under the discovery rules, F. R. C. P., shall be deemed to toll the application of this Rule."

In reality, petitioner's only argument is that this Court should seize this opportunity to overrule *Link v. Wabash R. Co.*, 370 U. S. 626, *reh. den.*, 371 U. S. 873 (1962), notwithstanding the fact that petitioner, a lawyer and a member of the Bar of this Court, was aware of, and shared the responsibility for the protracted inaction in the District Court and the consequences thereof.

A. Nature of the Case.

Howard S. Spering (hereinafter sometimes referred to as "petitioner", or "Spering") commenced this action against Texas Butadiene & Chemical Corporation, a dissolved Delaware corporation (hereinafter sometimes referred to as "respondent" or "TB&C") over six years ago on June 25, 1965, seeking legal fees of over $900,000 from his former client claimed to be due on the basis of an alleged oral agreement entered into in March, 1954. Respondent denies any liability for Spering's claim, asserts that he had admittedly been paid over $170,000 pursuant to specific written agreements and that the claim is barred by various affirmative defenses—statute of limitations, statute of frauds, estoppel, novation, vagueness, uncertainty and illegality. It has been plain from the outset that the action is totally without merit.

B. Course of Proceedings.

A brief outline of the chronology of the proceedings demonstrates the desultory attitude of petitioner and his attorney in the District Court.

June, 1965	Complaint filed.
August & December, 1965	Spering's deposition taken by defendant.

January, 1966	Amended answer filed and interrogatories propounded by TB&C.
October, 1966	Spering's answers to TB&C's interrogatories after Court overrules objections to interrogatories.
[First period of inactivity—fifteen months.]	
February, 1968	Spering's four token interrogatories filed.
May, 1968	TB&C files answers to Spering's four interrogatories.
[Second period of inactivity—fifteen months.]	
September, 1968	Clerk of the District Court requires report on status of case. TB&C warns that the case should be moved along or dismissed. Spering promises to proceed more expeditiously.[3]

3. The opinion of the Court of Appeals sets forth the relevant excerpts of the September 3, 1968 correspondence at pages 3a-4a:

"On August 2, 1968 Civil Action No. 3047, *Howard Spering v. Texas Butadiene & Chemical Corporation* was more than three years old. Accordingly, pursuant to Local Rule 3 of the District Court for the District of Delaware, plaintiff was asked on that day to file with the Clerk of the Court 'a statement in sufficient detail explaining why the case has not proceeded more expeditiously.'

"In a response dated September 3, 1968 counsel could 'only suggest that the plaintiff himself is an attorney actively engaged in the practice of law in Washington, D.C., the period of time during which the claim asserted by the plaintiff arose extends over a period of years, and great number of documents, memoranda and correspondence had to be reviewed from time to time as the case proceeded.' By way of conclusion, plaintiff's attorney stated: 'Plaintiff intends to proceed at this point more expeditiously in preparation for the trial of this case.' Defendant's letter to the Clerk of the Court stated defendant's position that 'it is incumbent upon plaintiff to move the case along promptly or dismiss it.' The District Court took no action at that time."

March, 1969	Spering writes to his lawyer stating his awareness that the case may already have been prejudiced by delay. (12a-13a)
August, 1969	TB&C moves to dismiss under Local Rule 12 for the failure to take action within one year and under Rule 41 (b) for lack of prosecution.
September, 1969	Motion to Dismiss considered and case dismissed by Judge Steel.
October, 1969	Chief Judge Wright heard reargument and additional material submitted by Spering and affirmed the dismissal.

The opinion of the Court of Appeals analyzes the history of the case in the District Court and we respectfully incorporate that analysis by reference (1a-9a).

C. Decision of the Court of Appeals.

The Court of Appeals regarded as highly significant the fact that Spering was a lawyer and his own awareness of the prejudicial lack of action and the fact that he did not cause the situation to be remedied. As stated in its opinion (5a):

> "Plaintiff Howard Spering, himself a lawyer, was not unaware of the dangerous drift that had set in for some time in the prosecution of his case. In a letter to his attorney dated March 26, 1969 Spering noted that 'months have gone by without our moving forward in our case against Texas Butadiene & Chemical Corporation.' 'I fear', he continued, 'that so much time has gone by without action on our part that we have prob-

ably already prejudiced our negotiative position in the case, if not also our position before the court.' "

The Court concluded (6a-7a):

"As our extensive recital of the history of the case has indicated plaintiff is himself a lawyer and as such not unaware of the importance of exercising rights timely. Just as the failure to comply with the statute of limitations might extinguish an otherwise valid right so are there perils from extended inaction in the conduct of a lawsuit. Indeed in plaintiff's letter to his attorney almost six months prior to the order of dismissal he expressed the 'fear that so much time has gone by without action on our part that we have probably already prejudiced . . . our position before the court.' "

"Appellant argues that 'this is not . . . (his attorney's) lawsuit, it is Mr. Spering's lawsuit;' and that 'any delay in the prosecution of the claim has not been Mr. Spering's responsibility, it has been Plaintiff's lawyer's responsibility.' The effect of the dismissal, appellant concludes, 'is to invoke a severe and harsh penalty upon plaintiff who himself has not been, if you will, guilty of any conduct that caused delay in the prosecution.' "

"To this contention the Supreme Court of the United States replied:

'. . . Petitioner voluntarily chose this attorney as his representative in the action, and he cannot now avoid the consequences of the acts or omission of this freely selected agent. . . .' Link v. Wabash Railroad Company, 370 U. S. 626, at 633-634, 82 S. Ct. 1386 at 1390.

"Where plaintiff is himself an attorney the Supreme Court's words are the more strongly applicable . . .".

The Court concluded, "Two judges of the District Court considered appellant's arguments and did not find in them the 'good reason for the inaction' required by Rule 12. We have passed over the same ground and more and are also satisfied that there has been no abuse of discretion. Reversal of the District Court's order of dismissal is unwarranted." (8a). Petitioner now simply urges this same worn-out argument on this Court.

D. Lack of Merit in Spering's Claim.

Spering's case is totally and palpably devoid of merit. Its mere presentation is a waste of judicial time and effort. Commencing in 1954, every bill Spering ever submitted was promptly and fully paid in a total amount of over $170,000, pursuant to specific written bilateral agreements. It was not until over ten years later that he claimed for the first time that he was entitled to additional compensation. The claim is supported by nothing other than Spering's *ipse dixit* assertion, and is clearly contradicted by contemporaneous documents Spering himself authored.

TB&C was formed in 1954 to construct butane dehydrogenation facilities with associated butadiene extraction facilities, an alkylation plant and blending facilities for the manufacture of aviation gasoline and butadiene for synthetic rubber. After nine years of operation the facilities were sold and the corporation was dissolved in 1963.[4]

When TB&C commenced its activities in 1954, Spering was a practising lawyer in Washington, D. C., using experience gained as a government official during the Government's synthetic rubber operating program during World

4. Factual references are documented in the brief filed by TB&C in the Court of Appeals. See, e.g., pp. 11-19.

War II and thereafter in the Petroleum Administration. TB&C engaged Spering to undertake negotiations for an alkylation facilities contract for the United States Government after having reached, in advance, written agreement as to the basis for his compensation. The scope of Spering's employment and the precise amount of his compensation were documented in detail in letters accepted by both Spering and TB&C.

The first letter agreement of March, 1954 established a per diem rate and a monthly retainer. This letter, authored by Spering himself, states in pertinent part as follows:

> ". . . You requested that I submit to you in a letter a basis upon which I would represent your interests here.
>
> "The usual per diem rate for such services is $125, and I should be pleased to work with you at this rate, with the understanding that a part of a day would be compensated ratably. On a project of this character, it is generally desirable to agree upon a minimum monthly retainer arrangement over the probable period during which the services would be required since I would be compelled to reserve time available for the work. On this basis, in the event that the time which is devoted to your interests exceeds the number of days compensated for by the minimum retainer at the above per diem rate, any additional time would be charged at $125 per day or ratably for part of the day. . . . a minimum retainer of $500 per month will probably be reasonable for such period of time as we may then agree upon . . ." (Appendix A)

This 1954 fee arrangement was superseded by subsequent letter agreements in 1956 and 1959 which raised

the per diem and retainer rates to Spering. It is undisputed that Spering submitted and TB&C promptly paid periodic statements in which Spering always referred to the then current letter agreement as the basis for the compensation. No other compensation arrangements were expressed or implied or even suggested at any time. When TB&C's business ended in 1962 Spering sent his final bill and wrote, "as far as I can tell this should clear up our accounts to date." (Appendix B).

In 1963 when the government instituted renegotiation proceedings TB&C again requested Spering to represent it and retained him before the Government Renegotiation Board in accordance with his usual billing practice, although at a higher rate. At the beginning of the renegotiation phase Spering's rate had increased to $250 per day. This was later increased to $400 per day, the increase being attributable to, in Spering's own words, ". . . the prevailing rates charged by other attorneys in this vicinity in the light of today's higher overhead and living costs." Spering submitted bills for his services at these increased per diem rates and TB&C promptly paid him accordingly. Again there is no document or any fact which indicates any agreement or any indication that there was any expectancy by Spering of additional compensation.[5]

Spering concluded all of his services for TB&C shortly after his July 31, 1964 billing. Instead of sending a final billing, he submitted a bill in November of 1964 in which he claimed for the first time that for his services from 1954 to date, he was entitled to one million dollars which he "voluntarily reduced" to $600,000 leaving a balance of $428,769.79 after crediting the $171,000 which had already been paid to him. However, it was not until he filed the complaint in the

5. There is no factual basis whatsoever for Spering's claim in this suit or his fictional and self-serving description of the "basic arrangement" which he asserts at page 5 and 6 of the Petition.

District Court, claiming over $900,000, that he alleged any oral agreement for any such additional compensation. The record in the District Court clearly shows that there is nothing to support such a claim.[6]

It is clear that there is no factual or legal basis for Spering's unsupported claim of a contingent fee. His lethargic lack of prosecution reflects this lack of merit and his basic lack of confidence in the case. This litigation met its appropriate demise when it was dismissed by the District Court and when that dismissal was affirmed by the Court of Appeals.

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6. TB&C has always admitted that there is some unbilled and unpaid time for which it has tendered payment to Spering. This claim is preserved by the opinion of the Court of Appeals. The precise amount of the admitted claim is not clear but it is not more than $9,500 for which TB&C has offered judgment to Spering in the District Court.

ARGUMENT.

I. No Question Is Presented Which Merits Review by This Court.

A. The Requirements for Certiorari Are Absent.

The Court will exercise its discretion and grant certiorari only where there are "special and important reasons therefor". For example, certiorari is inappropriate unless there is a conflict among the courts of appeals or where a federal question has been decided in "conflict with applicable decisions of this Court" or where there has been a significant departure from the "usual course of judicial proceedings" such as to require the supervision of the Court. Rule 19, Rules of the Supreme Court. None of these prerequisites is present here.

1. There Are No Special or Important Reasons and No Departure From the Usual Course of Judicial Proceedings.

The action of the District Court plainly fell within its discretionary power and was a result achieved only after careful consideration. Petitioner allowed his case to lay dormant in the District Court and took no action after warnings and his awareness of the prejudice from delay. Dismissal of this kind of case advances the administration of justice.

2. There Is No Conflict Among the Courts of Appeals nor Conflict With the Decisions of This Court.

Petitioner can point to no decision in other Courts of Appeals which conflicts with this decision. Furthermore, petitioner does not contend that this case conflicts with applicable decisions of this Court. He concedes that this case

is governed by the prevailing Supreme Court precedent on the subject, *Link v. Wabash R. Co., supra.* Indeed, he asks that this case be the occasion for this Court to overrule *Link,* even though the facts of this case present a far more egregious failure to prosecute than did the *Link* case.

B. This Case Does Not Present an Appropriate Occasion for Reconsideration of Link v. Wabash.

Petitioner attempts to create the erroneous impression that this Court's opinion in *Link v. Wabash* is a judicial aberration (P 15-27). To the contrary, even on its own facts *Link* is respected law.

It is important to keep in mind the factual differences between *Link* and the instant case. In *Link* an active case was dismissed because plaintiff's lawyer was unable to attend a pretrial conference due to other commitments. The plaintiff himself was completely blameless. Affirmance of that dismissal confirmed that the district courts have broad discretionary powers in the administration of justice. Here petitioner, himself a seasoned lawyer was aware of and a participant in, the delays and inaction. Dismissal of the action, appropriate in *Link,* was all the more appropriate here.

Spering relies on dissenting opinions of Mr. Justice Black in some cases where he expressed sympathy for a "harsh result". For example, in *Pittsburgh Towing Co. v. Mississippi Barge Line,* 385 U. S. 32 (1966) reh. den. 385 U. S. 995 (1966) and *Berman v. United States,* 378 U. S. 530 (1964) the litigant's case was lost because of tardiness of counsel in complying with deadlines under court rules. The same was true in *Lord v. Hellmandollar,* 378 F. 2d 780 (D. C. Cir. 1965), *cert. den.,* 383 U. S. 928 (1966) reh. den. 384 U. S. 928 (1966) and *Beaufort Concrete Co. v. Atlantic States Construction Co.,* 352 F. 2d 460 (5th Cir. 1965), *cert. den.,* 384 U. S. 1004 (1966) and *Santana v. United States,*

385 U. S. 848 (1966) and *Morris v. Florida*, 393 U. S. 850 (1968). It is hard to imagine how these dissenting opinions can be of any comfort to Spering. His dilatory conduct in the District Court as the months dragged on and on bears no resemblance to the plight of litigants where cases were dismissed because of a lawyer's "near miss" on procedural deadlines.

Moreover, it is equally incorrect and irresponsible for Spering to assert in this Court that certain decisions of the Court of Appeals are not in accordance with the *Link* decision.[7] The facts compelling reversals in the cases upon which Spering relies[8] are so remarkably distinctive that they are quite consistent with *Link* and certainly of no help to Spering.

Petitioner's representation to this Court that *Link* is the subject of widespread judicial disapproval is incor-

7. Spering's petition ignores the wealth of authority upholding dismissals by the District Court under far more favorable to the plaintiff than those presented here. See, *e.g., Davis v. United Fruit Company*, 402 F. 2d 328 (2d Cir. 1968); *cert. den.* 393 U. S. 1085 (1969); *Hicks v. Berkins Moving and Storage Co.*, 115 F. 2d 406 (9th Cir. 1940); *Kenney v. California Tanker Company*, 381 F. 2d 775 (3d Cir. 1967); *cert. den.* 390 U. S. 904 (1968); *Messenger v. United States*, 231 F. 2d 328 (2d Cir. 1956); *Nasser v. Isthmian Lines*, 331 F. 2d 124 (2d Cir. 1964); *Torino v. Texaco, Inc.*, 378 F. 2d 268 (3d Cir. 1967); *Esteva v. House of Seagram, Inc.*, 314 F. 2d 827 (7th Cir. 1963); *Grunewald v. Missouri Pacific Railroad Company*, 331 F. 2d 983 (8th Cir. 1964); *Fitzsimmons v. Gilpin*, 368 F. 2d 561 (9th Cir. 1966); *Schwarz v. United States*, 384 F. 2d 833 (2d Cir. 1967).

8. For example, in *Peterson v. Term Taxi, Inc.*, 429 F. 2d 888 (2d Cir. 1970) plaintiff lost his case because he could not be reached over a weekend to be notified of his trial on Monday and was a half-hour late. In *Flaksa v. Little River Marine Construction Co.*, 389 F. 2d 885 (5th Cir. 1968), *cert. den.*, 392 U. S. 928 (1968), the case was not a stale case (it was less than a year old and had promptly been filed), and the sympathy of the Court of Appeals for that lay plaintiff whose counsel had been grossly negligent was predicated on the fact that plaintiff had no knowledge or participation in the neglect, unlike the instant case where Spering is a lawyer and knew that the lack of activity by his local counsel was prejudicial

rect. The case stands as a correct decision even on its own striking facts. The principles established in *Link* apply *a fortiori* to the instant case. It is entirely inappropriate for him to suggest that this Court should grant certiorari, overrule the *Link* case, reverse the Court of Appeals and hold that it is an abuse of discretion to dismiss the case of a litigant who is a lawyer and a member of the Bar of this Court, who is aware of the consequences of delay and who nonetheless knowingly tolerates a series of delays in a four-year old case culminating in a final delay which exceeded the one-year period of a valid local rule.

II. The Determination by Both Courts Below Is Clearly Correct.

A. The Action of the District Court Was Well Within the Exercise of Its Discretion.

There is no dispute that a District Court has discretionary power to dismiss for lack of prosecution and there is no dispute that dismissal for inaction under a valid one-year rule is not, in and of itself, an abuse of discretion. The circumstances of each case must be examined to de-

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8 (cont'd)
to the case. In *Brown v. Thompson*, 430 F. 2d 1214 (5th Cir. 1970) the District Court committed a clear abuse of discretion in denying the plaintiff an involuntary nonsuit and instead dismissed his case with prejudice because plaintiff was temporarily prevented from obtaining documents in police files which were privileged while an official investigation was still in progress. In *Glo Co. v. Murchison & Co.*, 397 F. 2d 928 (3d Cir. 1968), cert. den., 393 U. S. 939, the very complex nature of the oil royalty agreements and the unclear nature of the admitted claim were quite different from the simplicity, and lack of merit of the instant case where Spering's claim for unbilled time requires only a calculation of time worked multiplied by a per diem rate. It is interesting to note that the *Glo Co.* case was dismissed a second time for failure to prosecute and there was no appeal. Equally inapposite is *L. P. Steuart, Inc. v. Matthews*, 329 F. 2d 234 (D. C. Cir. 1964), *cert. den.* 379 U. S. 824 (1964), which arose in an entirely different context and *Bibeau v. Northeast Airlines Inc.*, 429 F. 2d 212 (D. C. Cir. 1970), the facts of which are vastly different.

termine the proper scope and exercise of discretion. These circumstances were considered by two District Court judges based upon a full record and after Spering and his local counsel both had been given a full opportunity to be heard. The Court of Appeals considered all of the same matters "and more" and determined that the two District Court judges had not abused their discretion in dismissing the case.

B. The Circumstances Clearly Justify Dismissal.

The opinion of the Court of Appeals sets forth sufficient circumstances justifying the dismissal: (a) the one-year delay before dismissal was not explained; (b) the general lack of prosecution of the case was unexplained; (c) Spering's promise a year before the dismissal to proceed more expeditiously was not honored; (d) respondent's warning of dismissal for lack of prosecution a year before the dismissal was not heeded; (e) Spering himself is a seasoned lawyer; and (f) Spering himself was aware of the fact that there had been a delay and of the consequences of such delay in prejudicing a case.

C. Spering Cannot Avoid the Consequences of the Inaction of His Attorney.

In arguing for the granting of certiorari in this case and the overruling of the *Link* case, Spering depends entirely upon the alleged negligence and misrepresentation of his attorney. Assuming *arguendo* that his attorney was negligent and that he misrepresented the facts to Spering,[9]

9. There is no suggestion that TB&C or its attorneys were aware of or participated in any act of negligence or misrepresentation by Spering's former attorney—if any existed. We do not dignify with a reply the baseless innuendos appearing on pages 30-31 of the petition except to note that it would seem appropriate for the Court to strike at least this part of the petition or a least to disregard the same as scandalous pursuant to Rule 40(5) of the Rules of the Supreme Court.

it is clear under *Link* and other cases [10] that the blaming of one's attorney is not an excuse for failure to prosecute.

The *Link* holding that an attorney's neglect, especially in the circumstances shown by the record here, is not an excuse for lack of prosecution is obviously the correct rule. The judicial system can work only if litigants are responsible for acts of their attorneys voluntarily chosen. The rules so contemplate. See Rule 5, F. R. C. P. To rule otherwise would be to punish the other litigant and the judicial system itself. It is suggested by Spering that his attorney's alleged infidelity breached the agency relationship. Whether or not this may be true for certain purposes, *vis-a-vis* the attorney-client relationship, it is certainly not true with respect to third parties and has no application to any principle of law involving the administration of justice or the dismissal of cases for lack of prosecution.

Such an argument comes with exceeding ill grace in this case where the plaintiff himself is a lawyer and engaged in the active practice of law and has been a member of the Bar of this Court since 1947. Spering instituted this action ten years after allegedly making the agreement upon which it was based and after the respondent corporation had been dissolved. Surely it was incumbent upon petitioner to move the case forward with celerity. As the Court of Appeals recognized, plaintiff's status as a lawyer and his awareness of delays virtually compelled the result.

Finally, Spering cannot avoid the plain and admitted fact that he was aware that there had been a delay and that he was aware of the consequences of the delay. Yet, he did nothing properly to supervise his attorney or to obtain new counsel. Whatever remedies he may or may

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10. See, e.g., *Davis v. United Fruit Company, supra; Nasser v. Isthmian Lines, supra.*

not have against his counsel are irrelevant to the decision of whether or not this Court should grant certiorari.

D. A Reversal Here Would Create Chaos in the Administration of Justice.

Petitioner claims that the Court of Appeals set forth no standards and asks this Court to provide guidelines. The guidelines are quite clearly established already, and a reversal of the opinion of the Court of Appeals in the instant case would be counterproductive. Indeed, it would seem that district courts would be completely "at sea" in the administration of justice if they were powerless to control their dockets by dismissing cases such as the instant case. Rules like Local Rule 12 and Rule 41, F. R. C. P. would become meaningless.

As the Court stated in *Link*, the reason for vesting the district courts with this discretion is to ". . . prevent undue delays in the disposition of pending cases and to avoid congestion on the calendars of the District courts, [and] . . . to clear their calendars of cases that have remained dormant because of the inaction or dilatoriness of the parties seeking relief . . . [this] 'inherent power' [is] governed . . . by the control necessarily vested in courts to manage their own affairs so as to achieve the orderly and expeditious disposition of cases." 370 U. S. at 629-31.

Indeed, the standard of *Link* is a clear standard—that the District Courts in enforcing rules such as Local Rule 12 and in supervising the conduct of cases by litigants and their lawyers are vested with a very wide discretion and only compelling circumstances clearly demonstrating an abuse of that discretion will be sufficient to constitute a reversal.

CONCLUSION.

The Petition for Certiorari should be denied.

Respectfully submitted,

E. Norman Veasey,
David T. Dana, III,
Counsel for Respondent.

Of Counsel:

Richards, Layton & Finger,
4072 DuPont Building,
Wilmington, Delaware. 19899

Dated: August 19, 1971.

APPENDIX A.

HOWARD S. SPERING
1518 K Street, Northwest
Washington 5, D. C.
NAtional 8-3482-3

March 26, 1954

Mr. Robert L. Purvin
Fidelity Union Life Building
Dallas, Texas

Dear Mr. Purvin:

On March 22, 1954 in my office you discussed with me the project which your firm is developing for the construction and operation of a butane dehydrogenation facilities with an associated alkylation plant and butadiene extraction facilities. As I told you, the proposed project interests me greatly and I should be very pleased to collaborate with you. You requested that I submit to you in a letter a basis upon which I would represent your interests here.

The usual per diem rate for such services is $125, and I should be pleased to work with you at this rate, with the understanding that a part of a day would be compensated ratably. On a project of this character, it is generally desirable to agree upon a minimum monthly retainer arrangement over the probable period during which the services would be required since I would be compelled to reserve time available for the work. On this basis, in the event that the time which is devoted to your interests exceeds the number of days compensated for by the minimum retainer at the above per diem rate, any additional time would be charged at $125 per day or ratably for part of the day. Expenses, if any, incurred specifically in your interest would be item-

ized and billed additionally. I would, therefore, suggest that when you are ready with the necessary information for us to put together a picture to present to the Government, a minimum retainer of $500 per month will probably be reasonable for such period of time as we may then agree upon.

Recognizing that prior to such time you may have occasion to call upon me for preliminary advice or counsel, the time devoted in such preliminary phases could be charged at the above mentioned per diem rate with any incidental expenses accounted for and billed separately. I believe that the type of preliminary and ultimate arrangement suggested would be best suited to the requirements of your project as I understand it at the present time.

I shall look forward to your further advice in the matter, and enjoy working with you. I will send you a separate letter indicating my views as to the possibility of obtaining an Alkylation Contract from Government and the type of data and information that would be required.

Very truly yours,

HOWARD S. SPERING
Howard S. Spering

HSS:lp

APPENDIX B.

SPERING, MORTON & DUTTON
ATTORNEYS AT LAW
1518 K Street, Northwest
Washington 5, D. C.

NAtional 8-3482

HOWARD S. SPERING
DAVIS W. MORTON, JR.
HOWARD B. DUTTON

PETROLEUM
PETROCHEMICALS
ADMINISTRATIVE
MATTERS
FEDERAL TAXES

August 16, 1962

Mr. John R. Kerby, Jr., Treasurer
Texas Butadiene & Chemical Corporation
529 Fifth Avenue
New York 17, N. Y.

Dear John:

After sending you our statement for retainer and expenses through July 31, 1962, it has just now come to my attention that we had failed to invoice you for reimbursement of our cost of purchase of copies of the transcript of the hearing we had before the Oil Import Appeals Board. Consequently I am enclosing in duplicate my statement for reimbursement of this item expense advanced.

As far as I can tell, this should clear up our accounts to date.

Best wishes.

Sincerely,

HOWARD

HOWARD S. SPERING

HSS:lmh
Enclosure

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E. ROBERT SEAVER, CLERK

IN THE

Supreme Court of the United States

OCTOBER TERM, 1971

No. 71-99

HOWARD S. SPERING, *Petitioner*

v.

TEXAS BUTADIENE & CHEMICAL CORPORATION,
Respondent

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Third Circuit

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PETITIONER'S REPLY BRIEF

HOWARD S. SPERING
1000 Connecticut Avenue
Washington, D. C. 20036
Attorney for Petitioner
Acting for Himself

October 13, 1971

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PETITIONER'S REPLY BRIEF

SPERING'S CLAIMS SHOULD BE RECOGNIZED OR ASSUMED TO HAVE SUBSTANTIAL MERIT AT THIS PRETRIAL STAGE

A. SPERING'S VITAL ROLE IN CREATION OF RESPONDENT AND IN SUSTAINING ITS BUSINESS LIFE IS UNCONTRADICTED IN THE RECORD.

Respondent's (TB&C's) Brief in Opposition repeatedly seeks to challenge the merit of Spering's case, while disregarding all of Spering's sworn testimony given at his deposition taken by TB&C's attorneys, that stands wholly *uncontradicted* on the record by testi-

mony of any other witness. That testimony recites in detail the basic background and key relationship of Spering to the creation and development of the substantial industrial plant project, which became TB&C. It also reviews his continuing services that were vital to the company's business life under contracts with the Department of Defense, and that provided $112,000,000, or nearly 60 percent of TB&C's gross receipts throughout its life.

1. Respondent's Attorneys Seek Unfairly and Falsely To Conceal Spering's Vital Role and True Perspective of His Underlying Relationship to Respondent

The Transcript of Spering's said testimony, Docket # 32, taken by TB&C's attorneys on August 12, 1965, was inexplicably withheld from the record in the District Court, and presumably from the Judges of said Court, *for nearly three years* until May 3, 1968. But Spering received a copy of that transcript from his former attorney on September 15, 1965, paid the Court reporter for it directly on October 29, 1965, and provided copies of his corrections of it to his attorney before his later deposition was taken on December 30, 1965. Yet the transcript of that later deposition was promptly filed and became a part of the record on January 27, 1966.

Statements in the lower portion of page 7 of TB&C's attorneys' Brief seek to give the *wholly false* and *erroneous* impression that TB&C had already commenced activities and was in operation in 1954 when Spering commenced his services in the interest of the project in March 1954. Contrary to this, TB&C was not even incorporated until Spering insisted in July 1954 that a corporate entity should be created with some substantial owners of its initial pro forma com-

mon stock before he would submit the original proposal to Government for a contract that was to form the foundation for financing the construction and operation of plant facilities and the commencement of a business. That *birth-giving contract* was not executed until *a year later in July 1955!*

Also contrary to their statement, TB&C did *not have nine years of operation.* It had no plant facilities with which to commence any operations until February 1957 and it sold those facilities *five years later* in July 1962, not in 1963. Moreover, it did not even have any organization of personnel capable of operating a plant or producing and selling any product until shortly before February 1957, almost three years after Spering's efforts started in March 1954.

This perspective on the relationship of Spering to the creation and development of an operating going-concern, that was only a gleam in the eye of Robert L. Purvin in March 1954, has been cunningly concealed from the Court's view in TB&C's Brief. That perspective is necessary to bring into focus in its proper light Spering's letter dated March 26, 1954 to Mr. Purvin, which is Appendix A to TB&C's Brief. It merely recites a willingness to collaborate with Purvin on a very *preliminary* basis believed best suited to the requirements of striving to develop the project, as it stood *at that time.* It was not submitted to be signed as a written agreement, and was not signed or otherwise accepted in writing by Purvin.

Neither Purvin nor Spering *at that time* knew whether or when such a project could be developed, or even whether Purvin could get anyone to pay Spering on a current basis at the low support-level rate that he required. As a consequence, no written agreement was

made between them. Spering nevertheless proceeded actively with Purvin and design engineers to develop a plant project and then to prepare the proposal to Government, in reliance upon the basic oral understanding with Purvin for ultimate compensation to be paid to Spering based on the fair value of his services in relation to the success that might be achieved with the project.

Purvin had originally proposed that Spering serve, as Purvin was doing, without any current support-level compensation and depend entirely on the ultimate compensation based on the fair value of Spering's services and the success of the project. Spering agreed to gamble on ultimate compensation, but pointed out that he had to have some minimum support-level compensation if he was to devote the large amount of time that would be required. This was the basic understanding with Purvin. See pages 83 through 87 of Spering's first deposition, Docket # 32. This was confirmed by Purvin on a number of significant occasions in later years, as specified in detail, with references to testimony, in Appellant's Reply Brief in the Court of Appeals.

2. Letters From Officer-Director-Stockholders Evidence Spering's Decisive Part in Creation of Respondent

Spering devoted more than 190 days of recorded service time in the first sixteen month period from April 1954 through July 1955 when the $15,000,000 Facilities Investment Underwriting Contract that he negotiated was finally executed by Government. Because of conflict of interest Spering had to forego other substantial retainer relationships during that period and in subsequent years. See pages 53 through 55 and page 97 of Spering's first deposition, Docket # 32.

That Spering's services *were decisive in giving birth* to TB&C's construction of plant facilities and eventual business operations is clearly evidenced and acknowledged in three letters attached hereto as Appendix I, II, and III, that Spering received from officers of TB&C's two primary stockholders, Godfrey L. Cabot, Inc. and Carl M. Loeb, Rhoades & Co., that together owned 89% of its voting stock and continue to be the controlling stockholders: I—dated July 19, 1955 from Russell G. Allen, then Executive Vice President of Godfrey L. Cabot, Inc.; II—dated July 25, 1955 from Louis W. Cabot, then Vice President of Godfrey L. Cabot, Inc. (now Chairman of the Board of Cabot Corporation, its successor name); and III—dated March 12, 1957 from Mark Millard, then and now a senior partner in Carl M. Loeb, Rhoades & Co. Messrs. Cabot and Millard were vice presidents and directors of TB&C in July 1955 and were directors at all times. See also pages 56 through 61 of Spering's first deposition, Docket # 32, for Spering's salvaging the project after all others had given up in March 1955.

B. RESPONDENT'S ATTORNEYS IGNORE THE FACT THAT NO WRITTEN OR OTHER AGREEMENT EXISTED FOR THE SECOND PERIOD RENEGOTIATION WORK OTHER THAN A LAWYER'S RECOGNIZED RIGHT TO COMPENSATION FOR THE FAIR VALUE OF HIS SERVICES UNDER CANON 12.

TB&C's Brief totally ignores the fact that there was no written agreement of any kind nor any other understanding discussed by Spering with TB&C with respect to his *second period* of service, having to do with the renegotiation proceedings in 1963 and 1964. For these services Spering claims, and believes, he is clearly entitled to full compensation based on the "fair value" of his services to TB&C in accordance with Canon 12 of the Canons of the American Bar Associa-

tion. He not only brought unique knowledge and ability into those renegotiation proceedings by reason of his comprehensive background in TB&C's affairs involved therein, but he also *had to assume full responsibility* for all decisions in connection with the proceedings and for locating from the company's files, then in storage boxes, all the relevant economic and accounting records needed to respond fully and effectively to all matters challenged by the Renegotiation Boards, regional and national.

Respondent's attorneys on page 9 of their Brief repeat the misleading statement that "Spering concluded all of his services for TB&C shortly after his July 31, 1964 billing" and "instead of sending a final bill, submitted a bill in November 1964". They thus persist in seeking to create the same *false* impression that Spering did not bill TB&C "until nearly four months later" asserted in their brief before the Court of Appeals. The *truth clearly shown* in Defendant's Exhibit # 4, identified at page 119 of Spering's first deposition, is that from July 26, 1964 through October 26, 1964 Spering devoted 150 hours of recorded service time, more than 28% of his total time of 527 hours engaged in the renegotiation work in the period from June 1963 through October 1964. The record is clear that Spering's final statement was promptly issued November 11, 1964. See Defendant's Exhibit # 1 identified at page 108 of Spering's aforesaid first deposition.

The final complete clearance of TB&C issued by the national Renegotiation Board on October 15, 1964, with *no payment* of any amount to Government, was an outstanding success that might not otherwise have been achieved in the face of the national Board's charges of a "windfall".

C. DISTRICT COURT AND COURT OF APPEALS ASSUMED VALIDITY AND SUBSTANTIAL MERIT OF SPERING'S CLAIMS.

Contrary to TB&C's Brief seeking to challenge the merit of Spering's case, Chief Judge Wright in the District Court declared, at the hearing October 16, 1969 on whether to vacate the order of dismissal of Spering's case, "I am assuming for the purpose of this argument that *you have a legitimate claim* for the purpose of this argument". Also, the Court of Appeals in its Opinion, page 2a of the Petition for a Writ of Certiorari herein, declared "We do so mindful that appellant's claim might ultimately have had some *substantial merit.*" (Emphasis supplied in both quotations).

D. COMPENSATION TO PETITIONER FROM RESPONDENT ON A TIME BASIS AVERAGED MUCH LESS THAN FROM OTHER CLIENTS IN THE SAME PERIOD, AND THUS CORROBORATES SPERING'S BASIC UNDERSTANDING THAT HE WOULD RECEIVE ULTIMATE FAIR VALUE COMPENSATION.

Spering's Answers to Interrogatories submitted by TB&C's attorneys required him to review and report on essentially all fees, time of service, and fee arrangements that he had with each of his other clients in the 11-year period from January 1954 to the end of 1964. The District Court and TB&C's attorneys regarded this information and the amounts of fair-value fees paid to Spering by others as highly relevant to the validity and magnitude of Spering's claims against TB&C. For this reason the District Court required Spering to respond to those Interrogatories, over objections raised by his attorneys on the ground that it was unduly burdensome. Spering thus was compelled to devote more than twenty full days to ferreting out the information and preparing the Answers.

Those Answers and Defendant's Exhibit # 3, identified at page 119 of Spering's said first deposition, establish:

(a) that Client D paid Spering a total of $46,000.00 for his services from January 1955 through September 1957 on a "fair value" basis, that constituted compensation on a time basis equivalent to $414.00 per day using 8 hours of recorded service time as a day;

(b) that Client W paid Spering a total of $36,576.00 for his services from May 1960 through October 1965 on a "fair value" basis, that constituted compensation on a time basis equivalent to $459.00 per day using 8 hours of recorded service time as a day;

(c) that if TB&C paid Spering at that $459.00 per day "fair value" rate for the 851 days of his services for it in the first period from April 1954 through July 1962, its compensation to Spering *for that first period alone* should have been $390,609.00, or $242,111.00 more than the $148,498.00 that it paid Spering for that period;

(d) that, after allocating all of his business expenses to his clients on the basis of the time devoted to services for the respective clients in the total period from 1954 through 1964, the average *net* compensation per day from *all other* of his clients was $170.88 per day for a total of $205,575.00; and

(e) that, after allocating all of his business expenses to clients on the same time basis for the same 11-year period, the average *net* compensation per day from *TB&C* was only $100.36 per day for a total of $91,784.00;

The data therefore show that at no time in the first period of eight and one-third years of his services did

TB&C compensate Spering in any amounts competitive with or even approaching the "fair value" compensation computed to a per day basis that he received from some other clients for his services within the same period. Incidentally, those clients also paid support fees on a current basis, and a final "fair value" amount. The data also show that even the average *net* compensation per day that Spering received from TB&C over the total of the two periods of his services was substantially below (only 59% of) the average *net* compensation that he received from *all other* of his clients over the same total period.

These data thus *fully corroborate* the fact that *TB&C's compensation to Spering,* throughout both periods of his services was *at support-level per diem rates* only, and *below the levels of actual compensation* he received *from others.* This was in accordance with his basic understanding, that he would be ultimately compensated by TB&C on the basis of the real value of his services to the project to be determined in the light of the success of the undertaking when the measure of its success and his contributions to it could be determined and such "fair value" compensation could be readily paid.

CONCLUSION

For the foregoing reasons the validity and substantial merit of Spering's claims against TB&C in these proceedings should be recognized, or at least should be assumed without question, by this honorable Court for the purpose of its consideration of Spering's Petition for a Writ of Certiorari. A writ of certiorari should therefore issue to review the judgment and opinion of the Third Circuit Court of Appeals.

Respectfully submitted,

HOWARD S. SPERING
1000 Connecticut Avenue
Washington, D. C. 20036
Telephone: (202) 659-1777
Attorney for Petitioner
Acting for Himself

October 13, 1971

APPENDIX I

GODFREY L. CABOT, INC.
77 FRANKLIN STREET
BOSTON 10, MASSACHUSETTS

TELEPHONE: LIBERTY 2-7300
CABLE ADDRESS
CHANDERYAR, BOSTON

July 19, 1955

Mr. Howard S. Spering
1518 K Street, Northwest
Washington 5, D. C.

Dear Howard:

Congratulations to you on the successful outcome of the work with ASPPA.

We are all very proud to have you as a member of the team, not only because of the results you can obtain, but no less importantly because of your manner of operation.

Sincerely yours,

/s/ Russ
R. G. Allen

RGA:bg

APPENDIX II

GODFREY L. CABOT, INC.
77 FRANKLIN STREET
BOSTON 10, MASSACHUSETTS

TELEPHONE: LIBERTY 2-7300
CABLE ADDRESS
CHANDERYAR, BOSTON

July 25, 1955

Mr. Howard S. Spering
1518 K Street, Northwest
Washington 5, D. C.

Dear Howard:

Although I have been away on vacation for the past two weeks I have kept up to date on the progress of TB&C. Now that I am back I want to take the opportunity of complimenting you on the successful completion of our agreement with ASPPA. More than that! I know you are responsible for the initial conception of this whole arrangement which I feel sure will handsomely serve the best interests both of our nation and of those who risked their money in the project.

It has been a privilege to work with you.

Sincerely,

/s/ Louis
Louis W. Cabot
Vice President

LWC:es

APPENDIX III

CARL M. LOEB, RHOADES & CO.
42 WALL STREET
NEW YORK

New York 5
March 12, 1957

Mr. Howard S. Spering
1518 K Street, Northwest
Washington 5, D. C.

Dear Howard:

Many thanks for your letter of March 8. I agree with you that has been a disappointment to all of us, but I think that it must have been particularly disappointing to you in the light of your long association. Forget it as fast as you can! I hope for John Lynch and Paul Haas, with whom I had a long talk, that they made a good deal.

Much more important is the satisfaction which we all feel with the good start-up of Texas Butadiene. We are all very much aware of the decisive part which you played in making it possible.

With best regards,

Sincerely,

/s/ MARK
Mark Millard

MJM.mjk